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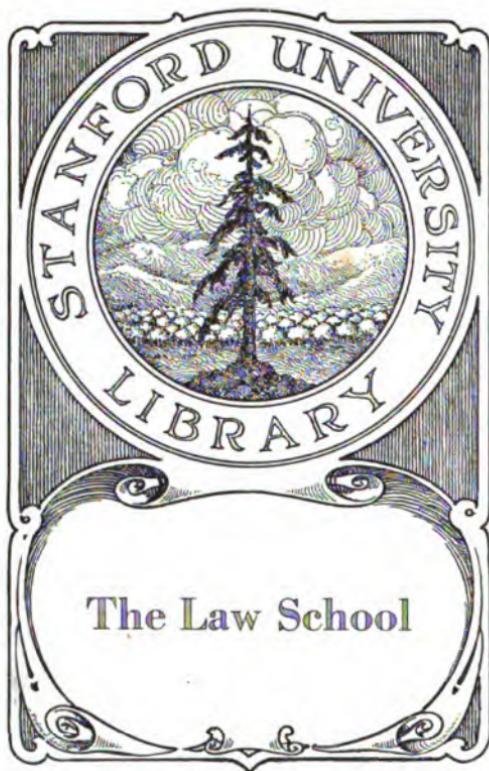
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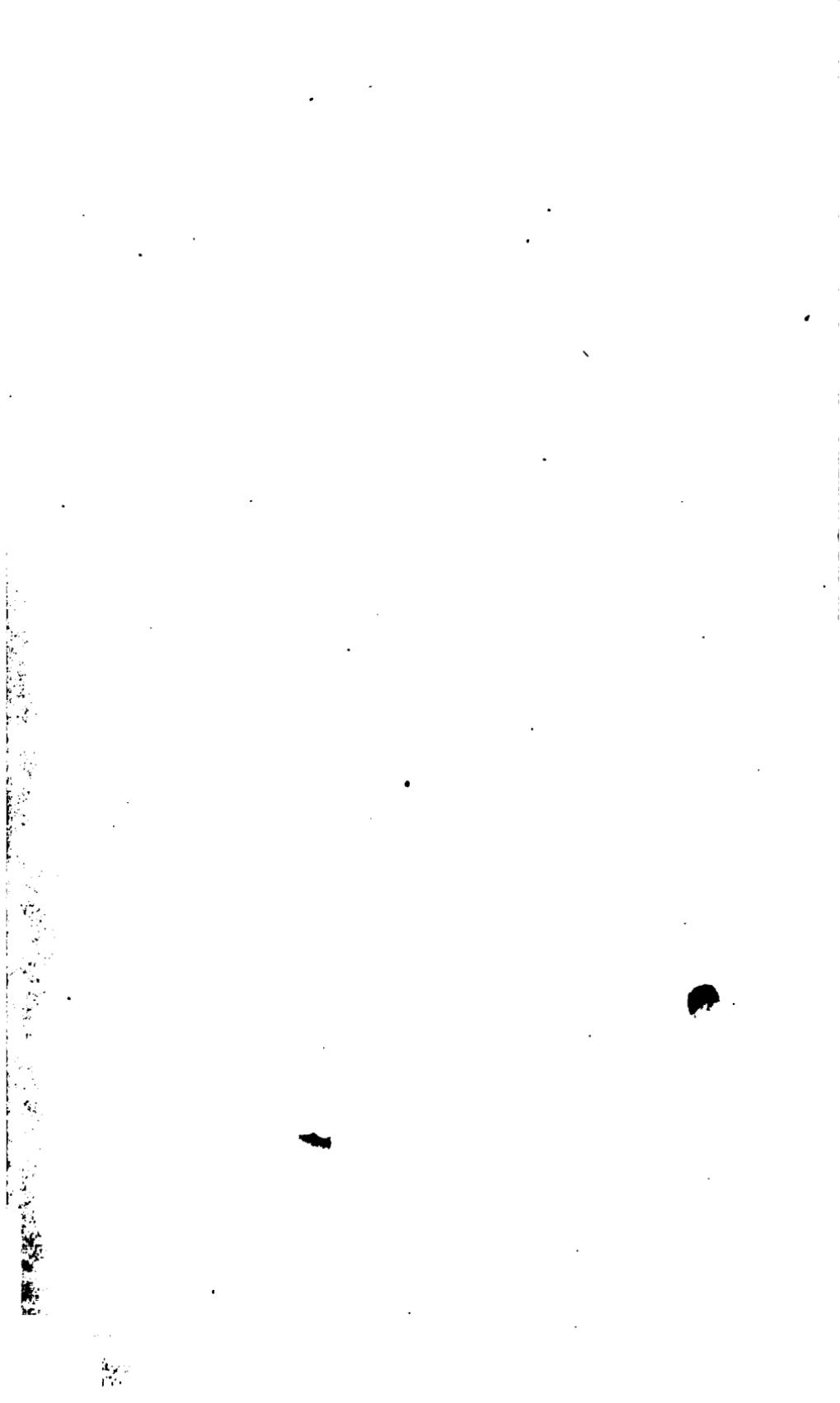
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The Law School









OFFICIAL OPINIONS
OF
THE ATTORNEYS-GENERAL
OF
THE UNITED STATES,
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO THEIR OFFICIAL DUTIES,
AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN
GOVERNMENTS AND WITH INDIAN TRIBES, AND
THE PUBLIC LAWS OF THE COUNTRY.

EDITED BY
A. J. BENTLEY, ESQ.

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VOLUME XV.

CONTAINING

THE OPINIONS

OF

HON. EDWARDS PIERREPONT,
OF NEW YORK,

HON. ALPHONSO TAFT,
OF OHIO,

AND

HON. CHARLES DEVENS,
OF MASSACHUSETTS.

ALSO CONTAINING OPINIONS GIVEN

BY

HON. SAMUEL F. PHILLIPS, of North Carolina,
Solicitor-General and Acting Attorney-General.



TABLE OF TITLES.

	Page.
Acceptance of a civil office by a retired officer	306
Accounting officers, effect of settlements by	192
Acting gunner in the Navy, dismissal of	564
Acts of former administration	208
Advertising tax-lists in the District	324
Advertising tax-lists in Sunday paper	327
Advertisement of mail-routes	527
Advertisements in the District of Columbia	594
Allowances for revenue-stamps	426
Allowances on Coast Survey Service	283
Allowances to district attorneys	277
Allowances to special agents of Post-Office Department	75
Amendments of Revised Statutes	222, 259
Appeals in customs cases	119
Appointments in the Treasury Department	3
Appointment of assistant appraisers at New York	449
Appraiser-general at New Orleans	260
Approval of court-martial sentence	290
Assignment of officers' pay-accounts	271
Attorney-General	574
Bond of mail bidder	471
Bonds issued under refunding act	233
Bounty-land claims	450
Bounty to colored soldiers	474
Branding cigar boxes	516
Burlington and Missouri River Railroad Company	458
Cadets at the Naval Academy	634
"Carriages," under the customs laws	113, 125
Case of Capt. Adam Badreau	407
Case of Col. J. B. Kiddoo	83
Case of Commander J. N. Quackenbush	463
Case of George Chorpenning	19
Case of Lieut. George M. Wells	442
Case of Maxwell's heirs	518
Case of Messrs. Vann and Adair	350
Case of Paymaster R. B. Rodney	446
Case of the Biddle Manufacturing Company	34
Case of the Chesapeake and Ohio Railroad Company	397
Case of the Continental Bank Note Company	382

TABLE OF TITLES.

	Page.
Case of Eagle and Phoenix Manufacturing Company	371
Case of the New Idria Mining Company	388
Case of the steamer Jackson	205
Centennial Exhibition	204
Cession of jurisdiction—taxes	167
Checks of disbursing officers	288, 303
Chicago, Burlington and Quincy Railroad Company	482
Citizenship	599
Citizenship—passports	114
Civil engineers in the naval service	165
Claim of Charles M. Fairman	487
Claim of George H. Giddings	364
Claim of Illinois Central Railroad Company	67
Claim of James B. Hambleton	423
Claim of John D. Sanborn	88
Claim of the Biddle Manufacturing Company	28
Claim of Thomas L. Higgins	39
Claims for Army transportation	626
Claims for property taken for the Army	35
Commissioners of the District of Columbia	216
Compensation for carrying the mail	74
Compensation of assistant United States attorney	189
Compensation of attorney	168
Compensation of customs officers	286, 355
Construction of telegraph on public domain	554
Contract	481
Contract for mail carriage	616
Contract for ocean mail service	558
Contract for patented article	26
Contract—per diem forfeiture	418
Contracts for Army and Navy supplies	124
Contract—withdrawal of bid	648
Contracts with John M. Mueller	531
Contracts with the Post-Office Department	226
Copies of papers—application for	562
Corporation engaged in distilling	230
Court-martial proceedings	432
Court of Alabama Claims—marshal's fees	533
Court of Alabama claims—marshal's pay	567
Customs duties	51
 Damages on dutiable merchandise, &c	 7
Deduction for non-performance of mail service	440
Defaced or destroyed coupons	438
Delegate to Congress—government contract	280
Department files—recommendations for office	342
Deposit of public moneys	359
Desertion—limitation for offense of	152
Disbursement of funds for Indian agencies	66

TABLE OF TITLES.

VII

	Page.
Disbursing agents for light-houses.....	348
Discharge from military service	658
Dismissal in the Navy	560
Dismissal of officers in the Marine Corps.....	421
Disposal of gold coin	413
Disposal of old material	322
Disposition of fees collected from vessels.....	44
Distribution of prize funds.....	575
Distribution of prize money.....	63
District of Columbia 3.65 bonds.....	56
Drawback on firearms	147
Dutiable value of certain wools	172
Duty of Attorney-General.....	138, 475, 574
Duty of district attorney.....	522
Duty on brandy.....	656
Duty on carpet wools.....	72, 76
Duty on chicory root.....	491
Duty on timber.....	32
Duty on wool	105
 Effect of pardon.....	60
Employés in the Indian service	434
Entrance and clearance of vessels.....	166
Expenses of direct tax commissions.....	106
Expenses of witness.....	486
Extra compensation	608
Extradition—Lawrence's case	500
 Fees of district attorneys.....	566
Fees of district attorneys, marshals, and clerks.....	386
Fifteen per cent. contracts	235, 253, 270
Forfeiture of contracts	524
Forfeiture of pay in the Navy	175
Fox and Winconsin Rivers improvement	31
 German-American Savings Bank	605
Government advertisements.....	232, 633
Graduates of Naval Academy—relative rank	637
 Hazing at the Naval Academy	80
Hire of buildings	274
Hot Springs Commission	430
 Improvement of South Pass of the Mississippi	183
Indemnity to States for swamp lands	340
Indian agents and agencies	405
Indian contracts—approval of	585
Indian Territory—fugitives in	601
India treaties.....	632

	Page.
International penitentiary congress	618
Issue of subsidiary silver coin	312
 Lands at mouth of Saginaw River.....	47
Las Animas grant.....	94
Lease of "The Arcade" in Chicago	613
Letting contracts—advertisement.....	538
Liability for tax on distilled spirits.....	559
Liability of sureties on official bond.....	214
License and enrollment of canal-boats.....	52
Limitation upon filling vacancies temporarily	457
Loss of registered mail matter.....	462
Lost registered bond.....	468
Lottery circulars.....	203
Loyalty of claimants.....	652
 Mail service	328
Mail transportation by railroads	92
Mail transportation by Union Pacific Railroad Company.....	610
Mail wagon.....	338
Marshal's fees.....	346
Merchant vessels—jurisdiction.....	178
Mileage for marshals.....	108
Mileage of Army officers—sea travel	496
Mileage of Naval officers	316
 Naval courts-martial	597
Naval officer in merchant service	61
New post-office building in New York	476
 Obstruction to navigation	515, 526
Ocean mail service	556
Office of collector of customs—abeyance	398
Office of surveyor of customs—abeyance	401
Offices of trust	187
Official compensation	71
 Paintings on glass—duty on.....	200
Patent for mineral land	29
Payment of claims—issue of requisition.....	596
Payment to Robert B. Lacey	45
Pay of retired naval officers	316
Pension agencies and agents	246
Per diem of special agents of Post-Office Department	82
Periodical publications	345
Power to mitigate fine, &c	436
Preservation of Army clothing	37
Privileged communications	378, 415
Produce of fisheries	661

TABLE OF TITLES.

IX

	Page.
Promotion in the Quartermaster's Department.....	330
Purchase of land.....	212
 Railroad grant—homestead entry	583
Railroad mail transportation	182, 598, 602
Railway post-office cars	169
Rebate on articles for repair of vessels	369
Refund of customs duties	121, 126
Refund of pay, &c., in the Army	177
Reinstatement of suspended officers	380
Relative rank in the Army	410
Relative rank in the Navy	336
Removal of obstruction to navigation	284
Removal of wreck	71
Resignation of foreign minister	90
Resignation of insane officer	469
Restored naval officer—pay of	569
Retired list—resection of arm or leg	199
Revenue-cutter service	396
Review of departmental decision	315
Ruling in the Clark Thread Company case	629
 Sale of blank manifests and clearances	654
Sanborn contract	133
Savings banks—taxation on deposits	452
"Sawed timber" and "sawed lumber"	492
School lands in California—indemnity	454
Settlement of accounts at the Treasury	139
Settlement with certain railway companies	1
Shipping	114
Soldiers detailed for special service	362
Special agents of the Post-Office Department	171, 417
Steinkauler's case	15
Storage fees	117
Superintendent of the Military Academy	110
Support of the Army	209
Suspension of officers	62
Suspension of officers—vacancies—nominations	375
 Tax on capital of banks and bankers	218
Temporary appointments by the President	207
Tonnage dues	35
Traders at military posts	278
Transfer of jurisdiction	480
Transmission of government telegrams	579
Transportation of merchandise in bond	128
Transportation of the mail	70
Trustee of Cincinnati Southern Railway	551
Twenty per cent. additional duty	335

TABLE OF TITLES.

	Page.
Unexpended balances of appropriations.....	357
Use and occupation—claim for	572
Use of metric system in postal service	224
Use of the Hunter stamp	191
Use of the official envelope	262
Washington Monument.....	149
Western and Atlantic Railroad of Georgia	621, 625
Widow pensioner	591
Wrecked vessel—issue of register	402

OPINIONS
OF
HON. EDWARDS PIERREPONT, OF NEW YORK.

*APPOINTED APRIL 26, 1875.

SETTLEMENT WITH CERTAIN RAILWAY COMPANIES.

By the second section of the act of February 27, 1875, chap. 108, the allowances to be admitted in favor of the railway companies settled with under that act are limited to the following subjects: First, payments made by them in cash; second, credits authorized by the general course of the business regulations of the Departments for transportation performed; but no abatement or increase in the amount of either the one or the other is admissible.

DEPARTMENT OF JUSTICE,

May 27, 1875.

SIR: I have the honor to acknowledge the receipt of your letter of the 21st inst., informing me that, as a preliminary step toward carrying out the provisions of the act of February 27, 1875, "to provide for settlements with certain railway companies," you have convened a board of officers to investigate the claims of the companies referred to therein and report upon the same to you, and that the board is in doubt whether the second section of that act authorizes "an abatement on payments that have been made in cash, or an increase of the amounts that have been allowed and credited to the roads for fares and transportation by the Quartermaster-General." And upon this point you request an expression of my views.

* NOTE.—The commission of Judge Pierrepont, as Attorney-General, bears date April 26, 1875; but he did not enter upon the duties of the office until May 15, 1875, up to which time his predecessor, Judge Williams, remained in office.

Settlement with certain Railway Companies.

The first section of said act empowers the Secretary of War and the Attorney-General "jointly to adjust and settle" the claims of the United States against the railroad companies enumerated therein, growing out of the sale and transfer of any rights or property by the former to the latter in the years 1865 and 1866. Those officers are authorized by this section, in adjusting and settling those claims, to make such abatement in the amount thereof as they shall deem just, in respect of any overvaluation of the property, not exceeding, however, 25 per centum of its valuation as made at the time of the sale or transfer.

The second section provides that "in such settlements no allowance shall be made in respect of any matter occurring prior to such sales and transfers, nor otherwise, except such payments as may have been made in cash, and such credits for transportation as the general course of the business regulations of the Departments authorizes;" in other words, the allowances to be admitted in favor of the companies settled with are confined to the following subjects, viz: first, payments made by them in cash; second, credits authorized by the general course of the business regulations of the Departments for transportation performed by them.

This provision, while it excludes from the settlement all matters of allowance except the two just indicated, plainly contemplates that the companies shall have the full benefit of the latter, but nothing beyond. Accordingly, they are to be allowed "such payments as may have been made in cash," and also "such credits for transportation as the general course of the business regulations of the Departments authorizes," without any abatement or increase in the amounts of either the one or the other.

Whether the amounts which have been allowed and credited to the companies for fares and transportation by the Quartermaster-General, to which you refer, are or are not such credits for transportation as the general course of the business regulations of your Department authorizes, I cannot undertake to determine. If they are, they should be admitted just as they stand, since in that case they answer the description of credits for transportation which the statute makes provision for, and none others can be allowed. If, on the other hand, they

Appointments in the Treasury Department.

are not credits of that character, they are open to correction or modification, so as to bring them within the statutory description.

I am, sir, with great respect, your obedient servant,
EDWARDS PIERREPONT.

Hon. W. W. BELKNAP,
Secretary of War.

APPOINTMENTS IN THE TREASURY DEPARTMENT.

The officers designated in section 2 of the act of March 3, 1875, chap. 130, as "deputy comptroller," "deputy commissioner of customs," "deputy auditor," and "deputy register," should be appointed by the President, with the advice and consent of the Senate. Section 169 Revised Statutes does not give the head of the Treasury Department authority to appoint them.

That act creates in each of the bureaus referred to a new office, under the designation of "deputy comptroller," &c., and tacitly abolishes the existing office of chief clerk therein; but it makes no provision on the subject of appointment to the newly-created offices.

The general rule deducible from article 2, section 2, of the Constitution, is that the appointment to any office of the United States established by Congress must be made by the President, with the concurrence of the Senate, unless it is otherwise provided in the Constitution or by legislative enactment.

DEPARTMENT OF JUSTICE,
June 25, 1875.

SIR: In compliance with the request contained in a letter received from Mr. C. F. Burnham, Assistant Secretary of the Treasury, dated the 9th instant, purporting to have been written under your instructions, I have examined the following question proposed by him in regard to the mode of appointing certain officers designated in the act of March 3, 1875, chap. 130, as "deputy comptroller," "deputy commissioner of customs," "deputy auditor," and "deputy register," namely: Whether the officers so designated should be appointed by the President, with the advice and consent of the Senate, or whether their appointment may be made by the head of the Treasury Department.

This question arises upon the second section of the above-mentioned act, the provisions of which, so far as they appear to be important in connection therewith, read thus:

Appointments in the Treasury Department.

"That on and after July 1, 1875, the organization of the Treasury Department, and the several offices thereof, and the annual salaries paid to the persons therein, shall be as follows, to wit:

* * * * *

"In the office of the First Comptroller: The First Comptroller of the Treasury, \$5,000; deputy comptroller, \$2,800; four chiefs of division, at \$2,400 each; six clerks of class 4, &c.

* * * * *

"In the office of the Commissioner of Customs: The Commissioner of Customs, \$4,500; deputy commissioner, \$2,500; two chiefs of division, at \$2,400 each; two clerks of class 4, &c.

* * * * *

"In the office of the First Auditor: The First Auditor of the Treasury, \$4,000; deputy auditor, \$2,500; four chiefs of division, at \$2,100 each; two clerks of class 4, &c.

* * * * *

"In the office of the Register: The Register of the Treasury, \$4,500; one assistant register and one deputy register, at \$2,500 each; seven clerks of class 4, &c.

* * * * *

"That the duties heretofore prescribed by law, and performed by the chief clerks in the several bureaus named, shall hereafter devolve upon and be performed by the several deputy comptrollers, deputy auditors, deputy register, and deputy commissioner herein named," &c.

* * * * *

In each of the bureaus enumerated above there is at present an officer styled "chief clerk." This officer being omitted in the organization thereof as established by the act of 1875, a preliminary inquiry here suggests itself, to wit, whether the deputy introduced into such organization, upon whom the duties of the chief clerk are devolved, is to be regarded as merely a change in the title of an existing office or as the creation of a new office. The result at which I arrive on this point is that the act creates in each of the bureaus referred to a new office, under the designation of "deputy comptroller," &c., and tacitly abolishes the existing office of chief clerk therein. That this view coincides with the understanding of Congress upon the same subject may reasonably be inferred from the fact that express provision is made for devolving

Appointments in the Treasury Department.

the duties of the latter upon the former, which would seem to be quite unnecessary if nothing more than a change of name were intended. Regarding, then, the various deputies established by the act of 1875 as new offices, I proceed to the consideration of the question submitted.

The Constitution (article 2, section 2,) gives the President power to appoint all officers of the United States whose appointments are not therein otherwise provided for, and which shall be established by law, but authorizes the Congress to vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. And the general rule deducible from this provision is, that, unless it is otherwise ordained in the Constitution itself or by positive legislative enactment, the appointment to any office of the United States created by Congress must be made by the President, with the advice and consent of the Senate. Hence this mode of filling the new offices mentioned above should be employed, if the head of the Treasury Department (and it is deemed unnecessary here to inquire further) is not vested by statute with authority to make the appointments thereto.

No provision on the subject of appointment to those offices is made by the act of 1875. But by section 169 of the Revised Statutes "each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employés, and at such rates of compensation respectively as may be appropriated for by Congress from year to year." Unless this section confers authority to make the appointments upon the head of the Treasury Department, I am not aware of any statutory provision that does; and its sufficiency in that respect depends upon whether the deputy comptrollers, deputy auditors, &c., are included within the meaning of the clause thereof which reads, "clerks of the several classes recognized by law." For I assume that those officers do not come within the terms of description immediately following in the same section, viz: "messengers, assistant messengers, copyists, watchmen, laborers, and other employés;" the word employé, which is, perhaps, the more general of these terms, being

Appointments in the Treasury Department.

taken in a restricted sense, in accordance with a familiar rule of interpretation—*noscitur a sociis*. That clause was unquestionably intended to have a very comprehensive scope, and to embrace a variety of subordinate officers in the different Departments besides those designated as clerks of the first, second, third, and fourth classes; such, for example, as those enumerated in section 201 as belonging to the Department of State, and in section 351 as belonging to the Department of Justice. It includes, in my opinion, the officers described in the act of 1875 as “heads of divisions;” a description applicable to a class of clerks then recognized by law in the organization of the Treasurer’s Office and of the Internal Revenue Bureau, and also to a class then actually existing, though without any statutory recognition, in other bureaus of the Treasury Department. But it clearly was not designed to include the deputy commissioners of internal revenue nor the deputy comptroller of the currency, since the appointment of these officers is especially provided for in other sections of the Revised Statutes (see sections 235, 322, 327). And the newly-created deputies in the bureaus of the Comptroller, Auditor, Register, &c., being officers of like grade with those just mentioned, as is indicated by their title, I think the clause in question cannot well be deemed to have any application to them.

My conclusion is that section 169 of the Revised Statutes does not invest the head of the Treasury Department with authority to appoint the new deputy bureau officers; and there being no other statutory provision, within my knowledge, which imparts to him this authority, it seems to me that under the Constitution their appointment can only be made by the President, with the advice and consent of the Senate; though in the recess of the Senate the President may, of course, fill them by temporary commissions.

It is true that in regard to the two deputy commissioners of internal revenue, and to the deputy comptroller of the currency, previously established, their appointment is in the Secretary of the Treasury. But this is by force of express legislative enactment, specially applicable to those officers; and from the fact that authority to appoint has been thus conferred in certain cases, the existence of a general authority

Damages on Dutiable Merchandise, etc.

of like character, exercisable in similar cases, is not to be inferred, but rather the contrary.

Presuming that the above covers the whole subject presented to me in Mr. Burnham's communication,

I have the honor to remain, with great respect, your obedient servant.

EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,

Secretary of the Treasury.

DAMAGES ON DUTIABLE MERCHANDISE, ETC.

Damages received during the voyage between the foreign port and the port of arrival, by merchandise entered at the latter port for "immediate transportation" to an interior port of destination under section 2990 Revised Statutes, should be ascertained at the port of destination.

In the case of merchandise so entered, the phrase "port where such merchandise has been landed," in section 2927 Revised Statutes, is construed to signify the port of destination; and the words in same section, "after the landing of such merchandise," are construed to mean after the landing at the port of destination. Accordingly, the "ten days," within which proof to ascertain the damage must be lodged in the custom-house, are to be computed from the landing of the merchandise at that port.

Merchandise which arrived at New York from a foreign port prior to March 3, 1875, but which arrived at an interior port under an immediate transportation bond without appraisement after that date, is by virtue of section 5 of the act of March 3, 1875, chapter 127, exempt from liability to the increased duties imposed by that act.

In such case the merchandise is to be regarded, under that section, the same as if the ship on which it reached the port of first arrival had continued her voyage to the port of final destination.

DEPARTMENT OF JUSTICE,

June 25, 1875.

SIR: In the communication submitted to me by the Acting Secretary of the Treasury, Mr. Conant, on the 26th of May last, two questions only need to be considered:

First, as to the allowance of ocean damage on merchandise entered "for immediate transportation without appraisement."

Second, as to the duty under the act of March 3, 1875, chargeable upon merchandise which arrived at the port of

Damages on Dutiable Merchandise, etc.

original importation prior to the date of that act, and which was transported without appraisement to an interior port, where it was subsequently entered.

The rule relating to damage, and the time, place, and mode of ascertaining the damage, depend upon the construction of the several statutes relating to that subject. The acts of 1799, 1823, 1870, and 1872 are the only acts which bear directly upon the question. The act of 1799 and the other acts above cited are substantially re-enacted in the Revised Statutes.

It will be convenient to refer to sections of the Revised Statutes instead of reciting the Statutes at Large.

By section 2926 of the Revised Statutes, all merchandise which has received damage during the voyage is required to be conveyed to some warehouse, designated by the collector, in the parcels or packages containing the same, there to remain, at the expense and risk of the owner or consignee, under the care of some proper officer until the particulars, &c., shall have been ascertained, and until the duties thereon shall have been paid, or secured to be paid, and a permit granted by the collector for the delivery thereof.

Section 2927 provides: "In respect to articles that have been damaged during the voyage, whether subject to a duty *ad valorem* or chargeable with a specific duty, either by number, weight, or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate or percentage of damage so ascertained and certified shall be deducted from the original amount, subject to a duty *ad valorem*, or from the actual or original number, weight, or measure on which specific duties would have been computed. No allowance, however, for the damage on any merchandise that has been entered, and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may on examining the same prove to be damaged, shall be made, unless proof to ascertain such damage shall be lodged in the custom-house of the port where such merchandise has been landed within ten days after the landing of such merchandise."

Section 2928 provides that "the same proceedings shall be ordered and executed in all cases where a reduction of duty

Damages on Dutiable Merchandise, etc.

shall be claimed on account of damage which any merchandise shall have sustained in the course of the voyage."

By section 2984, the Secretary of the Treasury is authorized, "upon production of satisfactory proof to him of the actual injury or destruction, in whole or in part, of any merchandise by accidental fire or other casualty while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, or in the appraiser's stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same shall have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon."

This section refers only to damage after arrival at the port of entry. The former sections relate only to damage during the voyage from the foreign port of shipment to the port of entry at which the vessel first arrives.

Section 2990 of the Revised Statutes declares that when any merchandise, except wine, distilled spirits, and perishable or explosive articles, or articles in bulk, imported at the port of New York, or any of the other ports named therein, "shall appear by the invoice or bill of lading and by the manifest to be consigned to and destined for either of the ports specified in section two thousand nine hundred and ninety-seven, the collector at the port of arrival shall permit the owner, agent, or consignee to make entry thereof for warehouse or immediate transportation, in triplicate, setting forth the particulars in such entry, and the route by which such merchandise is to be forwarded, whether by land or water."

The same section further declares that "the entry having been compared with the invoice and duly sworn to, and such an examination of the merchandise having been made as will satisfy the customs officers that the same corresponds with the manifest and invoice, and the duties estimated on the value and quantity of the invoice, and on the execution of a

DAMAGES ON DUTIABLE MERCHANDISE, ETC.

bond as hereinafter provided, the collector shall deliver the same, to be immediately transported to such port of destination, at the sole cost and risk of such owner, agent, or consignee."

Section 2991 provides that "the collector of the port shall give priority in time to the examination of merchandise imported to any of the ports of entry named in the preceding section, and designed for any port designated by section two thousand nine hundred and ninety-seven, for the purpose of forwarding the same to its port of destination, and the examination shall not necessitate the transportation of merchandise to the warehouse or appraiser's office. Such merchandise so entered for immediate transportation shall not be subject to appraisement and liquidation of duties at the port of first arrival, but shall undergo such examination as the Secretary of the Treasury shall deem necessary to verify the invoice and entry, and the same examination and appraisement thereof shall be required and had at the port of destination as would have been required at the port of original importation if such merchandise had been entered for consumption or warehouse at such port."

Section 2994 of the Revised Statutes provides that in case of merchandise transported from the port of first arrival to the port of final destination "in no case shall there be permitted any breakage of the original packages of such merchandise."

Section 2995 provides that "merchandise so destined for immediate transportation, except the packages designated for examination, shall be transferred, under proper supervision, directly from the importing vessel to the car, vessel, or vehicle in which the same is to be transported to its final destination; and if transferred from the importing vessel, to any bonded or other warehouse, or to any other place than such car, vessel, or vehicle, it shall be taken possession of by the collector as unclaimed and deposited in public store, and shall not be removed from such store without entry and appraisement, as in ordinary cases."

Section 2996 provides that "the Secretary of the Treasury may, in his discretion, and with such precaution as he shall deem proper, authorize the establishment of bonded ware-

Damages on Dutiable Merchandise, etc.

houses especially and exclusively appropriated to the reception of such merchandise in cases where its immediate transfer to the transporting car, vessel, or vehicle shall be impracticable. But merchandise remaining in such warehouse more than ten days shall be deprived of the privilege of transportation in bond conferred by this title, and shall be taken possession of by the collector as unclaimed and held until regularly entered and appraised."

The questions presented are, first, whether damage received during the voyage between the foreign port and the port of first arrival by merchandise entered for immediate transportation to an interior port of destination, under the above statutory provisions, is to be ascertained at the port of first arrival or at the port of destination. If at the port of destination, then whether the "ten days" within which proof of damage is required to be lodged in the custom-house is to be computed from the landing of such merchandise at the last port.

The language of the statute (section 2991) above cited provides, that "merchandise so entered for immediate transportation shall not be subject to appraisement and liquidation of duties at the port of first arrival," but that "the same examination and appraisement thereof shall be required and had at the port of destination as would have been required at the port of original importation, if such merchandise had been entered for consumption or warehouse at such port." This provision makes the intent of Congress clear, that the port of destination, and not the port of first arrival, is the place where the examination, appraisement, and liquidation are to take place. The express provision that the packages shall not be broken would of itself render it impossible to ascertain the amount of ocean damage, and, inasmuch as the right of deduction for such damage is retained, it is clear that the port of destination, and not the port of first arrival, is the place for the ascertainment of such damage. Moreover section 2926, which provides for the custody of the damaged merchandise until the duties thereon are paid, contemplates that such custody shall be under the control of the collector of the port at which the duties are required to be liquidated; and in section 2927, the appraisers to ascertain and certify

Damages on Dutiable Merchandise, etc.

the rate of damage are those belonging to the port where the liquidation of the duties takes place.

By section 2995, it is provided that merchandise entered for immediate transportation (except such packages thereof as may be designated for examination, in order to satisfy the customs officers that the entry corresponds with the manifest and invoice, or to verify the invoice or entry) shall be transferred, under proper supervision, directly from the importing vessel to the car or vessel in which the same is to be conveyed to its final destination; and by section 2994, such car or vessel is to be under the exclusive control of the customs officers, who in no case are to permit the breaking of the original packages of such merchandise until after it reaches the port of final destination. These provisions preclude the examination of merchandise at the port of arrival necessary to enable the importer to discover or the appraisers to ascertain the extent of the damage.

I am clearly of the opinion that the damage received during the ocean voyage by goods entered for immediate transportation, under section 2990 of the Revised Statutes, should be ascertained at the port of final destination. Section 2927 prohibits any allowance for damage or merchandise that has been entered "unless proof to ascertain such damage shall be lodged in the custom-house of the port where such merchandise has been landed 'within ten days' after the landing of such merchandise." The phrase "port where such merchandise has been landed" is not by its terms exclusively applicable to the port of first arrival, but may be applied to the port of destination, and in the case of merchandise entered for immediate transportation it must be understood to signify the port of destination, since it is at the custom-house of that port alone that the proof is to be used. The words "after the landing of such merchandise" must be taken to mean after the landing at the port of destination. I am clear, therefore, that the computation of the "ten days" is to be made from the landing of the merchandise at the last port.

The next question submitted is, whether merchandise imported into New York prior to the date of the act of March 3, 1875, but which arrived at an interior port under an immediate transportation bond without appraisement after that date, is liable to the increase of duties herein provided.

Damages on Dutiable Merchandise, etc.

The provisions imposing the increase of duties are contained in the third and fourth sections of the act. The third section declares that there shall be levied, collected, and paid on molasses and sugars, imported from foreign countries, certain duties in addition to those then imposed by section 2504 of the Revised Statutes; and the fourth section repeals so much of section 2503 of the Revised Statutes as provides that only 90 per centum of the several duties imposed on certain other articles by said section 2504 shall be levied, collected, and paid; declaring that the duties prescribed by the latter section on such articles shall remain without abatement. These provisions took effect on the day of the passage of the act, and, unless their operation had been limited by some other provision in the act, they would doubtless have affected all importations of the kind mentioned which had not been fully completed before that day.

In *The United States vs. Benzon* (2 Clifford, 512) it was held that the importation of foreign goods is not complete so long as the goods remain in the custody of the officers of the customs, and that, whether on shipboard or in warehouse, until they are delivered to the importer, they are subject to any duties on imports which Congress may see fit to impose. And the court says that the practice of the government has always been to regard such goods on shipboard or in warehouse as subject to new legislation.

The question, then, is, whether Congress has done anything to except these goods from the operation of law, so that they are relieved of the increased duty imposed by the act of March, 1875.

The fifth section of the act declares "That the increase of duties provided by this act shall not apply to any goods, wares, or merchandise actually on shipboard and bound to the United States on or before the 10th day of February, 1875, nor to any such goods, wares, or merchandise on deposit in warehouses or public stores at the date of the passage of this act."

This is by no means a question of easy solution. At the date of the passage of the act the goods were not "on shipboard," they were not "deposited in warehouse or public store," and they had arrived at the port of New York prior to

Damages on Dutiable Merchandise, etc.

the passage of the act, and were on their way to the interior port of final destination under an immediate transportation bond, and in custody of the revenue officers. If the goods had arrived and were actually on shipboard in the port of New York at the date of the passage of the act, or if they had gone into "warehouse or public store" in New York on the same day on which they were transported to the interior port under bond, and had remained in warehouse under the custody of the customs officers, it is clear that they would not be liable to increased duty. The question is, whether the fact that, under an immediate transportation bond, they continued their voyage to the port of final destination in custody of the customs officers, makes them subject to increased duties. A severe verbal construction of the statute would perhaps make them thus liable.

The operation of such construction would be to impose an increased duty upon one case of goods which arrived in a particular ship at the port of New York, and to exempt another case of the same goods by the same ship and arriving at the same date. It could not have been the intent of Congress thus to discriminate between the goods which went into public store at New York and those which, arriving at the same date, passed on to the port of final destination under immediate transportation bond. A construction which would make goods in this predicament liable to increased duty would be unequal, severely technical, and oppressive.

It is a sound rule in the construction of a statute of the United States which imposes a tax or other burden upon the citizen, and when there may be doubt about the true construction, to resolve the doubt in favor of the citizen upon whom the burden is imposed. In this case, however, I cannot doubt that the true construction is to hold that the Congress intended that goods in the situation above mentioned should be treated the same as though the ship continued her voyage to the port of final destination, and I therefore decide that the goods are not liable to increased duty.

Very respectfully, your obedient servant,
EDWADRS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

Steinkauler's Case.

STEINKAULER'S CASE.

S., a Prussian subject by birth, became naturalized in the United States in 1854. About five years afterwards he returned to Germany with his family, in which was a son, four years old, born in the United States, and became domiciled at Weisbaden, where both father and son have since continuously resided. The son, who is now twenty years of age, having been called upon by the German Government to report for military duty, S. invokes the intervention of the United States legation at Berlin, on the ground that his son is by birth an American citizen, but declines, in behalf of the son, to give any assurance of intention on the part of the latter to return to the United States within a reasonable time and assume his duties as a citizen: *Held* (1) that, under article 4 of the treaty of 1868 with North Germany, the father must be deemed to have abandoned his American citizenship, and to have resumed the German nationality; (2) that the son, being a minor, acquired under the law of Germany the nationality of his father, but did not thereby lose his American nationality; (3) that upon attaining his majority the son may, at his own election, return and take the nationality of his birth, or retain the German nationality acquired through his father; (4) yet that during his minority, and while domiciled with the father in Germany, he cannot rightfully claim exemption from military duty there. *Advised*, therefore, that the case presented does not call for interference on the part of the American Government.

DEPARTMENT OF JUSTICE,

June 26, 1875.

SIR: The facts upon which the Secretary of State asks the opinion of the Attorney-General are these:

"Mr. A. Steinkauler, a Prussian subject by birth, emigrated to the United States in 1848, became naturalized in 1854, and in the following year had a son born in Saint Louis, Mo. Four years after the birth of his son Steinkauler returned to Germany, taking his family, including this infant child, and became domiciled at Weisbaden, where they have all continuously resided. Nassau, in which Weisbaden is situated, became incorporated into the North German Confederation in 1866. This son has now reached the age of twenty years, and the German Government has called upon him to report for military duty. Mr. Steinkauler thereupon invokes the intervention of the legation of the United States at Berlin, on the ground that his son is a native-born American citizen.

Steinkauler's Case.

"To an inquiry by Mr. Davis, our minister at Berlin, whether the son would give an assurance of intention to return to this country within some reasonable period—to be fixed by himself—and to reside here and assume his duties as a citizen, the father, on his behalf, declined to give any such assurance."

The question is whether, upon the facts stated, it is the duty of the Government of the United States to interfere in this matter?

The status of young Steinkauler and his right to protection from the Government of the United States depend primarily upon his nationality. Nationality is either natural or acquired. The one results from birth, the other from the operation of the laws of kingdoms or states. Nationality by birth in some countries depends upon the place of birth, in others upon the nationality of the parents. There is no uniform rule of international law upon the subject; nor is there any treaty between the United States and North Germany, or any statute or rule of common law, either in North Germany or the United States (so far as I can find), which solves the question submitted. In North Germany, as in the United States, the minority of the child continues until the age of twenty-one years; and minor children of naturalized parents, domiciled and living with such parents in North Germany, though such minor children were born in the United States, are made German subjects, with the rights of German citizens, much the same as minor children of naturalized parents (though the children are foreign born) are rendered citizens of the United States by the naturalization of the parents of such minors.

In 1868 the naturalization treaty between North Germany and the United States was concluded. Article IV reads as follows: "If a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States. * * * The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country."

Section 1999 of the Revised Statutes of the United States reads as follows: "Whereas the right of expatriation is a

Steinkauler's Case.

natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle, this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic."

Under the treaty, and in harmony with the American doctrine, it is clear that Steinkauler, the father, abandoned his naturalization in America and became a German subject (his son being yet a minor), and that by virtue of German laws the son acquired German nationality. It is equally clear that the son by birth has American nationality; and hence he has two nationalities, one natural, the other acquired.

Difficulties like the one we are now considering, and which arise from double nationality, have recently been disposed of in England by statute 33 Victoria, May 12, 1870, ch. 14, sec. 10, sub. 3: "Where the father being a British subject, or the mother, being a British subject and a widow, becomes an alien in pursuance of this act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject."

We have no such statute, and we must therefore seek some other mode of solving this somewhat difficult question. Young Steinkauler is a native-born American citizen. There is no law of the United States under which his father or any other person can deprive him of his birthright. He can return to America at the age of twenty-one, and in due time, if the people elect, he can become President of the United

Steinkaufer's Case.

States; but the father, in accordance with the treaty and the laws, has renounced his American citizenship and his American allegiance, and has acquired for himself and his son German citizenship and the rights which it carries, and he must take the burdens as well as the advantages. The son being domiciled with the father and subject to him under the law during his minority, and receiving the German protection where he has an acquired nationality, and declining to give any assurance of intention of ever returning to the United States and claiming his American nationality by residence here, I am of opinion that he cannot rightfully invoke the aid of the Government of the United States to relieve him from military duty in Germany during his minority. But I am of opinion that when he reaches the age of twenty-one years he can then elect whether he will return and take the nationality of his birth, with its duties and privileges, or retain the nationality acquired by the act of his father. This seems to me to be "right reason," and I think it is law.

Since reaching the above conclusions, I am gratified to find a measure of support in the great authority of the present Lord Chief Justice of England. In his work on "Nationality" he says, at page 212:

"As regards the children, those born after the naturalization should of course follow the nationality of the father. Of those born before, a distinction should be made between those who accompany the father to the new country and those who do not. The latter should retain their nationality of origin. As regards the former, a distinction is again to be made between those who have attained their majority and those who have not. Those who are still minors, and who as such are still subject to the authority of the father and form part of his family, must be taken, at all events for the time, to follow his nationality; and as it may fairly be presumed that they will in the future remain in the new country and desire to become its citizens, they should be deemed to be such in the absence of any declaration to the contrary. But, inasmuch as by their birth they have acquired a right to the nationality of the country of birth, it ought not to be in the power of the parent to deprive them of it, if, on arriving at full age, they

Case of George Chorpenning.

desire to retain it, and a reasonable time should be allowed them to reject the nationality acquired by the father, and to claim that of the former country, without being subjected to the necessity of becoming naturalized in it."

While the Government of the United States with jealous care will protect its humblest citizen wherever found, yet, in the opinion of the Attorney General, it is not our duty to aid a young man of twenty years to escape from military service in a government whose protection he has enjoyed since four years old, and where he has an acquired nationality which he does not propose to give up, and, when interrogated by the envoy of the American Government, declines even to suggest that he ever intends to return to the United States and reclaim the nationality and assume the duties of an American citizen.

Protection from a government involves the reciprocal duty of allegiance and service from the citizen when needed. In the case presented, I see no occasion for interference on the part of the American Government.

Which is respectfully submitted.

EDWARDS PIERREPONT.

Hon. HAMILTON FISH,
Secretary of State.

CASE OF GEORGE CHORPENNING.

The award made by the Postmaster-General in favor of George Chorpenning, December 23, 1870, under the joint resolution of July 15, 1870, was not in its nature binding upon the United States until paid, and might be rendered null by the action of Congress at any time prior to its payment.

Congress having, before payment thereof, by joint resolution of February 9, 1871, repealed the joint resolution of 1870, under which the Postmaster-General had acted, and by subsequent acts (see 16 Stat., 519, 572; 17 Stat., 82) forbidden payment to be made out of appropriations under control of the Post-Office Department, the award thereupon ceased to have any efficacy.

It does not now constitute a valid foundation of claim, and an action would not be maintainable thereon.

Case of George Chorpenning.

DEPARTMENT OF JUSTICE,
July 23, 1875.

SIR: The questions referred by the President to the Attorney-General in the Chorpenning case are these:

First. Whether the Postmaster-General is obliged to make settlement and payment under the law as it now stands; and,

Second. Whether the case has any status in the Court of Claims.

The questions submitted to the Attorney-General are questions of law, in which the merits of the case are not involved.

The statutes and resolutions of Congress will sufficiently present the facts of this case.

The act of March 3, 1857, is in these words:

"SEC. 1. That the Postmaster-General be, and he hereby is, required to adjust the claim of said Chorpenning, as surviving partner of Woodward and Chorpenning, and in his own right, for carrying the mails by San Pedro, and for supplying the post-office at Carson's Valley, also for carrying part of the Independence mail by California, allowing a *pro rata* increase of compensation for the distance by San Pedro, for the service to Carson's Valley, and for such part of the eastern mail as was carried by California during all the time when said services were performed, as shown in the affidavits and proofs on file in the House of Representatives.

"SEC. 2. That the Postmaster-General be, and he hereby is, required to adjust and settle the claim of said Chorpenning as the surviving partner of Woodward and Chorpenning, for damages on account of the annulment or suspension of Woodward and Chorpenning's contract for carrying the United States mail from Sacramento, in California, to Salt Lake, in Utah Territory, as shown in the affidavits and proofs on file in the House of Representatives.

"SEC. 3. That the Postmaster-General be required to allow and pay to said Chorpenning his full contract pay, during the suspension of Woodward and Chorpenning's contract, from the 15th day of March, 1853, to the first day of July of the same year, and also to allow and pay to said Chorpenning thirty thousand dollars per annum, from the first day of July, 1853, when he resumed service under the contract of Wood-

Case of George Chorpenning.

ward and Chorpenning, down to the termination of his present contract, which said sum of thirty thousand dollars per annum shall be in lieu of the contract pay under both contracts, and the sums in this act authorized to be allowed shall be paid out of the Treasury."

Acting under this law, Postmaster-General Brown, on the 25th of May, 1857, found due to Mr. Chorpenning \$79,482, and on the 30th of October, of the same year, he added to that finding \$29,590.95; making in all the sum of \$109,072.95, which Mr. Chorpenning received under protest. He subsequently petitioned Congress for further relief, and on the 15th day of July, 1870, the following resolution was adopted by Congress:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Postmaster-General is hereby authorized and directed to investigate and adjust the claims of George Chorpenning under the first section of an act for his relief, approved March 3, 1857, on the basis of compensation allowed by said act for the regular service, and the claim growing out of the curtailment and annulment of his contract on route No. 12801, on the basis of his agreement with the Postmaster-General for the service, to be settled as provided for the services named in said act of March 3, 1857; and the right of appeal from the findings of the Postmaster-General to the Court of Claims is reserved and allowed to said claimant."

"Approved July 15, A. D. 1870."

Under this joint resolution the Postmaster-General, on the 23d of December, 1870, made the following decision :

"Whereupon I, John A. J. Creswell, Postmaster-General of the United States, do hereby certify that in performance of the duty enjoined upon me by the joint resolution of Congress, approved July 15, 1870, I have investigated and adjusted the claim of George Chorpenning under the first section of an act for his relief, approved March 3, 1857, on the basis of compensation allowed by said act for the regular service, and the claim growing out of the curtailment and annulment of his contract on route No. 12801, on the basis of his agreement with the Postmaster-General for the service; and

Case of George Chorpenning.

that I do hereby award and determine that there is due and owing to said George Chorpenning from the United States, for and in full satisfaction and discharge of said claims, the sum of \$443,010.60.

"As witness my hand and the seal of the Post-Office Department, this 23d day of December, 1870.

[SEAL.]

"JOHN A. J. CRESWELL,
"Postmaster-General."

Payment of this money was arrested by the resolution of the House of Representatives, January 12, 1871:

"Resolved, That the Committee on Appropriations be instructed to inquire into the allowance and manner of allowance of the claim of George Chorpenning, approved July 15, 1870, and the Sixth Auditor be requested to delay the payment of any warrant therefor till report thereon; and that they have power to send for persons and papers."

On the 9th of February, 1871, the following joint resolution was passed:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the joint resolution approved July 15, 1870, entitled 'A joint resolution authorizing the Postmaster-General to adjust the accounts of George Chorpenning,' be, and the same is hereby, repealed."

This resolution repeals the law under which Mr. Creswell acted. And in the appropriation bill of March 3, 1871, a provision was inserted forbidding any part of that appropriation to be applied to "what is known as the Chorpenning claim." And in making appropriation for the Post-Office Department the same provision was also inserted. (16 Stat., 519, 572.) And in the appropriation bill of May 8, 1872, a similar provision is inserted against the "Chorpenning claim." (17 Stat., 82.)

Thus the intent of Congress to prevent the payment of any part of what was called the "Chorpenning claim" is made clear; and the question is whether these acts of Congress do legally operate to prevent the payment of that claim? It is insisted by the counsel of Mr. Chorpenning that the reference

Case of George Chorpenning.

to the Postmaster-General was a reference to an arbitrator, to whom Mr. Chorpenning on the one hand and the Government on the other submitted the matter in dispute for adjudication; that the Postmaster-General was an arbitrator in the highest sense; that he acted judicially; that he was in fact a sort of judicial tribunal created by the Government; that his decision is an award binding like a judgment; that by reason of it the rights of Chorpenning were vested, and that the repealing act could not divest him of those rights, and that those rights thus vested involved the payment of the money as found due by the Postmaster-General.

The repealing act of Congress cannot divest the rights of Chorpenning which were vested before the repeal; but the absolute right to receive payment of the money found to be due by the Postmaster-General was not vested by the Postmaster-General's decision.

The Postmaster-General was not an arbitrator to whom both parties had agreed to submit their controversy and abide by the result, nor was he constituted a judicial tribunal competent to render judgment binding upon both parties. If he had decided that not a dollar was due to Mr. Chorpenning, Chorpenning would not have been bound by that decision; he could have appealed again to Congress, just as in this case he did appeal to Congress for more after the decision of Postmaster-General Brown, from whom Chorpenning received \$109,072.95.

A reference of a matter in dispute where both parties are not finally bound by the decision does not authorize the making of an award which shall operate in the nature of a judgment. The counsel for Mr. Chorpenning have, with great industry and ability, cited judicial decisions to prove that the United States are bound by their contracts with a citizen, and that rights vested before the repealing act are not affected by such repeal, and that laws retrospective in their action are unconstitutional. But it has never been held by this Department or by the Supreme Court of the United States that the repeal of a joint resolution of Congress before the payment of the money which had been found due under a reference to the head of a Department did not prevent the payment of the money.

Case of George Chorpennig.

In the case of *Gordon vs. The United States* (7 Wall., 193), it appears that on the 1st of June, 1860, a joint resolution was passed devolving upon the Secretary of War duties quite similar in their nature to those which were devolved upon the Postmaster-General in the present case.

The Secretary of War made an allowance in favor of the claimants of \$66,519.85 on the 23d of November, 1860. On the 2d of March, 1861, Congress rescinded the resolution under which the claim was referred to the Secretary of War. This raised the precise question that we are now considering, and the court say :

"As respects the effect of the repealing statute of March 2, 1861, the whole argument urged on behalf of the appellants is founded on a false assumption. It is asserted that this is a case of arbitrament and award, and was binding as such on the government, and that the repeal of the resolution of Congress could not affect or invalidate rights vested by the award previously made under it. But the Secretary of War was not an arbitrator. An arbitrator is defined as a private extraordinary judge, chosen by the parties who have a matter in dispute, invested with power to decide the same. The Secretary of War acted ministerially. The resolution conferred no judicial power upon him. In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy. The resolution under which the Secretary assumed to act did not authorize him to make a final adjustment of the matter embraced in it. It did not bind the appellant to an acceptance of the amount reported by the Secretary, or that he would cease to clamor for more after being a fifth time paid the amount of damages awarded to and accepted by him. * * *

"An arbitrament and award which concludes one party only is certainly an anomaly in the law. The various acts and resolutions of Congress in this case emanated from a desire to do justice and to obtain the proper information as a basis of action, and were not intended to be submissions to the arbitrament of the accounting officer. They were designed as instructions to the officer by which to adjust the accounts, Congress reserving to itself the power to approve,

Case of George Chorpenning.

reject, or rescind, or to otherwise act in the premises as the exigencies of the case might require. In other words, these references only require the officer to act in a ministerial, not a judicial capacity.

"The joint resolution of June 1, 1860, gave the appellant a tribunal before which his claim might be investigated. The repeal of that resolution only deprived him of that tribunal. It was competent for Congress to abolish the tribunal it created for the adjustment of the appellant's claims, or it might have committed them to some other authority. In either event the claimant's right would not have been violated, only his remedy for the enforcement of those rights would have been taken away or changed."

See further on this point opinion of Attorney-General Bates, 10 Opinions, 62, 271; *Kelly v. Crawford*, 5 Wall., 790.

The decision in "The twenty per cent. cases" (20 Wallace, 179), cited by the claimant's counsel, does not change the law as laid down in the foregoing cases.

The Chorpenning case came before the Court of Claims, as appears in Court of Claims Report, vol. 3, page 140. The court say: "But it is to be noted that no decision has yet been rendered against the Government on any so-called award, and the question is still entirely an open one whether such an award can be made the subject of an action against the Government." Upon the question whether the court had jurisdiction the judges were divided, but the prevailing opinion was that "the Postmaster-General was invested with an exclusive jurisdiction," and that the Court of Claims had not jurisdiction, and the petition was accordingly dismissed.

It is to be noted, however, that this decision was rendered in 1867, and long before the joint resolution referring the case to the late Postmaster-General was repealed. I am inclined to think that the Court of Claims would not now decline to entertain jurisdiction of the case.

Congress has made no appropriation for the payment of this claim, but has taken especial pains to exclude it in the various acts of appropriation above cited; and without an appropriation it cannot be paid.

My conclusion is that in the present state of the law the amount found due by the late Postmaster-General cannot be

Contract for Patented Article.

paid out of any existing appropriation, and that the Court of Claims has jurisdiction in the case, and that the claim now made against the Post-Office Department may be transmitted to said court under section 1063 of the Revised Statutes. But I am clearly of opinion that the amount found due on the reference to the late Postmaster-General cannot be sued upon as a binding award; and, unless Congress shall interpose, I think the statute of limitations will bar the claim.

Which is respectfully submitted.

EDWARDS PIERREPONT.

The PRESIDENT.

NOTE.—The Supreme Court of the United States, in the case of *Chorpenning vs. The United States*, which was decided during October term, 1876, on appeal from the Court of Claims (4 Otto, 397), held that from the repeal of the joint resolution of April 15, 1870, authorizing the Postmaster-General to adjust the accounts of George Chorpenning, and from the prohibition in the act of March 3, 1871, directing that no part of the money thereby appropriated for the use of the Post-Office Department shall "be applied to the payment of what is known as the Chorpenning claim," the implication is clear that nothing more was to be paid to him on account of said claim without further authority from Congress.

CONTRACT FOR PATENTED ARTICLE.

Where proposals were received by the Chief Signal Officer from different parties to supply certain manifold forms, at rates greatly varying in amount, and that officer, before awarding the contract, was notified by the party making the highest bid that the manufacture of the manifold forms is covered by a patent owned by himself, and that no other bidder could supply them without infringing his patent—some of the other bidders, however, denying the validity of the patent, and claiming that they are not thereby precluded from supplying the article: Advised that, under the circumstances presented, the contract should not be given to the lowest or any other bidder, if the article to be supplied is covered by the terms of a patent, unless the Chief Signal Officer is satisfied that the bidder has authority from the patentee to manufacture and sell it.

DEPARTMENT OF JUSTICE,

July 23, 1875.

SIR: I have examined the accompanying papers in relation to the purchase of manifold forms and carbon paper for the Signal Service of the Army, some of which were inclosed to

Contract for Patented Article.

me in letters from the chief clerk of your Department, dated the 7th, 10th, and 11th ultimo, and the remainder were received with your letter of the 19th ultimo.

It appears by these papers that the Chief Signal Officer recently advertised for proposals to furnish such articles as may be required for use at stations of the Signal Service during the year ending June 30, 1876, among which articles were included manifold forms and carbon paper. Proposals were subsequently received from different parties to supply the required quantities of the articles just named, at sums varying in amount from \$20,675.00 to \$4,730.25. Before awarding the contract, however, the Chief Signal Officer was notified by the party who had made the highest bid that the manufacture of manifold forms is covered by a patent owned by such party, and that no other bidder could supply that article without an infringement of the patent. On the other hand, the party whose bid was the lowest, and also the next lowest bidder, while conceding the existence of a patent for manifold forms, nevertheless claim that such forms had been manufactured both in England and in this country, and were in common use long prior to the date of the patent, and that they are not precluded thereby from contracting to supply the articles required.

Upon this the question is suggested, whether it would be proper for the Chief Signal Officer to award the contract for furnishing manifold forms to the lowest bidder, or whether he should decline all bids except that of the patentee, which is the highest.

Assuming that the right to manufacture, sell, and use manifold forms, such as are required for the Signal Service, is protected by a valid patent, it would obviously be unwise and improper on the part of an officer of the government to contract for the supplying of such articles with any party who is not authorized by the patentee to make and sell them, even though the party should tender a bond to indemnify the government against any loss or damage resulting therefrom. Now, a patent is of itself *prima facie* evidence of its validity; that is to say, that the patentee was the original inventor of the thing patented, and that the same was new and useful, and hence it devolves upon those who deny the validity

Claim of the Biddle Manufacturing Company.

thereof to show a prior invention, or to disprove its novelty and usefulness. In the case under consideration facts are alleged which, if true, would seem to be sufficient to establish a want of novelty in the subject of the patent, and thus the absence of an element essential to its validity. But the appropriate place to determine issues of this sort, affecting a patent already issued, is before a competent judicial tribunal.

Under the circumstances presented, I do not think it advisable to award the contract for furnishing manifold forms to the lowest or any other of the bidders mentioned in the accompanying papers, if such articles are covered by the terms of the patent referred to, unless the Chief Signal Officer is satisfied that the bidder has authority from the patentee to manufacture and sell them.

I have the honor to be, very respectfully,

EDWARDS PIERREPONT.

Hon. W. W. BELKNAP,

Secretary of War.

CLAIM OF THE BIDDLE MANUFACTURING COMPANY.

Bankruptcy proceedings against members of a partnership individually do not affect relations between such partnership and its creditors or debtors.

DEPARTMENT OF JUSTICE,

August 2, 1875.

SIR: Referring to yours of the 22d of June, 1875, in regard to a claim of Nathan Thompson for balance due him on an experimental gun, and to the inclosures, I have to say: Inasmuch as the inclosed affidavit of G. E. Biddle (July 7, 1875) and the inclosed deposition of E. W. Bancroft, taken in the case of *George E. Biddle vs. E. W. Bancroft*, pending in the New York supreme court for the city and county of New York (July 22, 1875), show that the "Biddle Manufacturing Company," which contracted with the United States to construct the Thompson gun, was for that purpose a firm, composed of E. W. Bancroft, Nathan Thompson, G. E. Biddle, and (perhaps) N. Bailey, and not E. W. Bancroft alone (as represented in the previous applications connected therewith), it follows that the bankruptcy proceedings pending against E. W. Ban-

Patent for Mineral Land.

croft alone do not stand in the way of the settlement of the claim of the said "Biddle Company" against the United States, in case his contract had been completed. Bankruptcy proceedings against members of a partnership individually do not affect relations between such partnership and its creditors or debtors; and, consequently, the opinion of the Attorney-General of November 18, 1873, has no application to the present case.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. W. W. BELKNAP,
Secretary of War.

PATENT FOR MINERAL LAND.

Four persons, citizens of the United States, located 1,000 feet on the Red Pine Lode, in Utah Territory, in July, 1871. One of them, in July, 1872, assigned to S., an alien, 400 feet of the same mine. In January, 1874, S. assigned the said 400 feet to D., a citizen of the United States, who has obtained the remainder of the 1,000 feet by proper assignments. Application is made by D. for a patent for the whole thousand feet: *Held* that D., by reason of the alienage of S., derived no right through him to a patent for the 400 feet referred to, and that he is entitled to a patent for only the 600 feet obtained from the other assignors.

DEPARTMENT OF JUSTICE,

August 6, 1875

SIR: The case and questions submitted by you to the Attorney-General on the 11th of May last are as follows:

"On the 18th of July, 1871, Jessie Foster, Chauncey Porter, E. V. Ankram, and W. Ankram, citizens of the United States, located 1,000 feet on the "Red Pine" Lode, in the Ophir mining district, county of Toole, and Territory of Utah. On the 29th of July, 1872, Chauncey Porter transferred to one N. Spofford 400 feet of said mine. The said Spofford was then, and is now, an alien, and has never declared his intention to become a citizen of the United States. There has never been any judicial determination that he was an alien, but proof establishing that fact *prima facie* has been filed in this proceeding. On the 19th of January, 1874, he, the said Spofford, transferred to Marcus Daly the said 400 feet. The said Daly

Patent for Mineral Land.

has procured proper transfers of all the interest in and to the said lode other than that so transferred by said Spofford. He is a citizen of the United States, and has made an application for a patent for the said thousand feet. Assuming that he has complied with the law in all other respects, I desire to propound for your consideration and answer the following questions:

1. Does the fact that N. Spofford, an intermediate grantee and grantor, was an alien at the time of receiving and making the transfer of said 400 feet operate as a legal bar to the issuance of a patent to said Daly for said 1,000 feet or any portion thereof; and, if it does, for what portion?
2. Upon the facts aforesaid, can a patent issue legally to said Marcus Daly for said thousand feet or any portion thereof; and, if so, what portion?

Upon consideration of the above case, I am of opinion that Daly's title to the patent for the 400 feet assigned to him by Spofford is no better than would have been that of such assignor. As Daly must deduce his title to a patent through Spofford, nothing occurs to me to hinder the application to his case of the well-known rule by which, at common law, purchasers of land from aliens took their title subject to all the disabilities of their assignors. (2 Kent, 61.) The present proceeding is one between the United States and the representative of an alien, and therefore such disabilities must control the result. No office found is necessary. (1 Eden, 128.)

However, the dealing with Spofford does not infect Daly's title to the parts of the location not included in such dealing. I therefore reply as follows:

1. The relation of Daly to Spofford avoids the title of the former to a patent for the 400 feet purchased from the latter, and leaves such title unaffected as to the remaining 600 feet.
2. Therefore, Daly is entitled to a patent only for the 600 feet obtained from others than Spofford.

I have the honor to be, very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. COLUMBUS DELANO,
Secretary of the Interior.

Fox and Wisconsin Rivers Improvement.

FOX AND WISCONSIN RIVERS IMPROVEMENT.

Under the act of March 3, 1875, to aid in the improvement of the Fox and Wisconsin Rivers (18 Stat., 506), the officers in charge of that work cannot acquire land needed therefor by purchase directly from the owner, but must have recourse to condemnation.

DEPARTMENT OF JUSTICE,

August 11, 1879.

SIR: I have examined the question presented for the consideration of the Attorney-General in a letter from Mr. H. T. Crosby, chief clerk of your department, dated the 8th of June, viz: "Whether, under the act of March 3, 1875, entitled 'An act to aid in the improvement of the Fox and Wisconsin Rivers,' &c. (18 Stat., 506), the officers of the United States in charge of that improvement may acquire land needed therefor by purchase direct from the owner, or whether they have authority to make the acquisition by condemnation proceedings only?"

The first section of the act declares that whenever, in the prosecution and maintenance of the improvement, it becomes necessary or proper, in the judgment of the Secretary of War, to take possession of any lands for canals and cut-offs, the officers in charge may, in the name of the United States, take possession of the same, "after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property lies."

And the second section authorizes a part of the appropriation "now made" for the further prosecution of the improvement (*i. e.* the appropriation made by the act of March 3, 1875, 18 Stat., 456) to be applied in payment of the property so taken.

The method of acquiring land described in this act is clearly not by bargain and sale or purchase directly from the owner, where the value or price is determined by agreement between the parties. Thus the value of the property which the officers are authorized to pay for and to take possession of must have been ascertained in the mode provided by the laws of the State; meaning, unquestionably, the mode established by the local laws for the valuation of property where it is sought to

Duty on Timber.

be acquired for public purposes under the right of eminent domain; in other words, where condemnation proceedings are instituted. The method of acquisition contemplated in the act seems, then, to be by proceedings of that character, and I think it does not authorize a resort to any other. This view appears to me to be strengthened by the fact that in the act of June 23, 1874 (18 Stat., 237), making an appropriation for the same improvement, authority is expressly given to employ a part of that appropriation "for the purchase of such real estate as may be required," &c., from which it may reasonably be inferred that if Congress had designed any portion of the appropriation made by the act of March 3, 1875, to be thus employed, it would have manifested its will in terms equally explicit and unmistakable.

I am accordingly of the opinion that the officers in charge of the work cannot, under the act in question, acquire land by purchase, but must have recourse to condemnation proceedings where it becomes necessary to obtain the ownership of the property.

I have the honor to be, very respectfully.

S. F. PHILLIPS,
Acting Attorney-General.

Hon. W. W. BELKNAP,
Secretary of War.

DUTY ON TIMBER.

Section 2504, Rev. Stat., schedule K, re-enacts a provision of the act of March 2, 1861, chap. 68, imposing a certain duty on "timber hewn," while in the same schedule and section a provision of the act of June 6, 1872, chap. 315, is re-enacted, imposing a different duty on "timber squared or sided": *Held* that, as regards squared or sided timber hewn, the latter provision superseded the former, and that this effect remains, notwithstanding the adoption of both in the Revised Statutes; but with respect to unsquared timber hewn, the provision taken from the act of 1861 is still in force. (Opinion of June 19, 1875, referred to.)

Timber hewn by the natural taper of the tree, if not in the commercial sense squared, is "timber hewn" within said schedule K.

DEPARTMENT OF JUSTICE,
August 14, 1875.

SIR: In yours of the 25th ultimo a question is presented whether the expression "timber hewn," in the first paragraph

Duty on Timber.

of schedule K, Revised Statutes, section 2504 (page 473), brought forward from the act of 1861, chapter 68, is superseded by the expression "timber squared or sided," in the second paragraph of the same schedule, brought forward from the act of 1872.

You inform me that the opinion of the Treasury Department previously to the enactment of the Revised Statutes was to that effect, but that since that enactment the decision has been that timber hewn is provided for by the first paragraph above mentioned.

This question is not altogether on all-fours with that in relation to "timber sawed," to which an answer was given by this department on the 19th of June last. Upon the whole, however, for like reasons, I think that, as regards squared or sided timber hewn, the act of 1872 superseded that of 1861, and that this effect remains, notwithstanding the adoption of the revisal. As for timber hewn by the natural taper of the tree, if not in the commercial sense squared, I am of opinion that it is technically "hewn," and not a "manufacture of wood," &c., within schedule K, above cited, because both of these phrases are taken from the act of 1861, and such must necessarily have been the original interpretation.

The act of 1872 did not repeal that of 1861 expressly, but only so far as inconsistent. The Treasury Department discovered such inconsistence between the expressions in the two acts as to timber (*i. e.*, lumber) sawed, and also as to squared or sided timber hewn. So far, of course, the latter act superseded the former. I do not understand, however, that the Treasury Department has ever decided the question as to the duty upon unsquared timber hewn, or that as to the commercial designation of timber hewn taperingly (*i. e.*, whether such timber be "squared"). As regards all unsquared timber hewn, if there be any, I think that the 20th section of the act of 1861 must be still in force.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

*Case of the Biddle Manufacturing Company.***CASE OF THE BIDDLE MANUFACTURING COMPANY.**

Former opinion in this case referred to (see opinion of August 2, 1875), and for reasons stated *advised* that payment of the claim be suspended for a reasonable time, say thirty days.

DEPARTMENT OF JUSTICE,
August 19, 1875.

SIR: I have read the caveat of William Birney, esq., as attorney for Mr. Donn Piatt, in the matter of the Thompson gun, and have also considered the question submitted by you in connection therewith in your note of the 18th instant.

For Mr. Birney to show that "The Biddle Company" was (*i. e.*, as I understand him, was in general) "E. W. Bancroft," as he proposes, would be to show no more than is admitted in the opinion of this Department submitted to you on the 2d instant.

The point established when the case was last here was that the relation between Bancroft and the Biddle Company being in general as above, it was agreed between Bancroft, Nathan Thompson, and G. E. Biddle that the name of the company might be used by them for the purpose of the contract (in question) with the United States; or, at all events, that all the benefits of such contracts should be shared equally between those persons. Upon this point of fact there was a concurrence between Thompson (now in Europe, but represented here by his attorneys, Messrs. North, Chase, and Wood, of New York) and Biddle and Bancroft (the two latter by affidavit and depositions, respectively).

What Mr. Birney will have to show in order to affect the case as it now stands is that, for the purposes of that contract, the Biddle Company was E. W. Bancroft, and besides, that in such contract it was not the trustee or agent for the persons above named. He does not expressly propose to do that. However, as possibly he may have included such a purpose, I recommend that if he think it can be done, a reasonable time, say thirty days, may be allowed for such purpose, and that in the mean time payment be suspended.

Although Mr. Birney discloses no interest on the part of his client (such as creditor of Bancroft, &c.) to give him a stand-

Tonnage Dues.

ing in the case, yet, *ex abundanti cautela*, it may be more satisfactory to give the matter the above direction.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF WAR.

TONNAGE DUES.

Under sections 4219, 4225, and 4371, Rev. Stat., certain foreign vessels, when found trading between district and district, &c., are liable to tonnage dues (including light-money), amounting to one dollar and thirty cents per ton.

DEPARTMENT OF JUSTICE,

August 19, 1875.

SIR: After consideration of yours of the 13th instant, I have to say that I am of opinion that under sections 4219, 4225, and 4371 of the Revised Statutes, vessels not shown to belong to a foreign nation which has satisfied the President that its discriminating duties operating disadvantageously to the United States have been abolished (*i. e.*, undocumented vessels) when found trading between district and district, or between different places in the same district, or carrying on the fishery, are still liable to tonnage dues (including light-money), amounting to one dollar and thirty cents per ton.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

CLAIMS FOR PROPERTY TAKEN FOR THE ARMY.

By the act of February 18, 1875, chap. 80, which amends the Revised Statutes by adding after section 300 * * * "section 300 B," the Commissary-General is authorized to examine claims submitted by loyal citizens of the State of Tennessee, and of the counties of Berkeley and Jefferson, West Virginia, for subsistence stores taken or received during the rebellion.

It is not material whether the actual presentation of such claims to him occurred before or after the adoption of that act.

CLAIMS FOR PROPERTY TAKEN FOR THE ARMY.

DEPARTMENT OF JUSTICE,

August 25, 1875.

SIR: Your letter of the 25th of May last, inclosing a communication from the Commissary-General of Subsistence, presents for my consideration the following question, suggested in that communication, viz: "Has the Commissary-General of Subsistence legal authority to receive and examine claims of loyal citizens of the State of Tennessee, and of the counties of Berkeley and Jefferson, West Virginia, for subsistence supplies 'taken' or 'received' during the war of the rebellion when such claims are presented to him subsequent to March 3, 1871?"

In connection with this question I have examined the various statutory provisions adverted to by the Commissary-General, contained in the act of July 4, 1864, chap. 240 (13 Stat., 381), the joint resolutions of June 18 and 28, 1866 (14 Stat., 360, 370), the act of February 21, 1867, chap. 57 (14 Stat., 397), the act of March 3, 1871, chap. 116 (16 Stat., 524), the act of April 20, 1871, chap. 21 (17 Stat., 12), the act of March 3, 1873, chap. 236 (17 Stat., 577), the act of June 16, 1874, chap. 285 (18 Stat., 75), and the act of February 18, 1875, chap. 80 (18 Stat., 316).

Under the act of July 4, 1864, and the joint resolutions of June 18 and 28, 1866, the Commissary-General had authority to receive and examine claims of the description referred to, until by force of the act of March 3, 1871, as heretofore construed by this department (see 13 Opinions, 401), it was taken away. Of the subsequent acts it is unnecessary to notice any here except the act of February 18, 1875. This act amends the Revised Statutes, by adding after section 300 "section 300 B," which provides that "all claims of loyal citizens in States not in rebellion for subsistence actually furnished to the Army and receipted for by the proper officer receiving the same, or which may have been taken by such officers without giving such receipt, may be submitted to the Commissary-General of Subsistence, accompanied by such proof as each claimant may have to offer; and it shall be the duty of the Commissary-General of Subsistence to cause each

Preservation of Army Clothing.

claim to be examined," &c.; and the act further expressly declares that this provision "shall extend to the State of Tennessee, and to the counties of Berkeley and Jefferson, in the State of West Virginia."

By virtue of that amendment (which is substantially a re-enactment of the provisions in the act of July 4, 1864, and in the joint resolution of June 18 and 28, 1866, referred to above), the Commissary-General is authorized to examine claims submitted by loyal citizens of the State of Tennessee, and of the counties of Berkeley and Jefferson, in the State of West Virginia, for subsistence stores taken or received during the rebellion; and it is not material whether the actual presentation of such claims to him occurred before or after the adoption thereof.

I therefore answer the question propounded by you in the affirmative.

I have the honor to be, very respectfully,
EDWARDS PIERREPONT.

Hon. W. W. BELKNAP,
Secretary of War.

PRESERVATION OF ARMY CLOTHING.

The *proviso* in the Army appropriation act of March 3, 1875, chap. 133, viz., "That no part of this sum shall be paid for the use of any patent process for the preservation of cloth from moth or mildew," does not forbid the application of any patent process to the preservation of clothing where the use of the same may be obtained without paying or incurring any obligation to pay therefor.

The appropriation referred to may accordingly be employed in applying the Cowles process, if its use can be had without charge.

DEPARTMENT OF JUSTICE,
August 25, 1875

SIR: I have considered the question proposed in a letter from Mr. H. T. Crosby, chief clerk of your department, dated the 30th ultimo, which was accompanied by a communication from Messrs. George A. Cowles & Co., of Philadelphia, and other papers touching the preservation of Army clothing by

Preservation of Army Clothing.

what is known as the Cowles process. The question put is, "Whether or not the appropriation for clothing for the present fiscal year (18 Stat., 454) can be legally used in applying this process to the preservation of Army clothing."

That appropriation is in the following terms: "For purchase and manufacture of clothing and camp and garrison equipage, and for preserving and repacking stock of clothing and camp and garrison equipage and materials on hand at the Philadelphia, Jeffersonville, and other depots of the Quartermaster's Department, one million four hundred and fifty thousand dollars: *Provided*, That no part of this sum shall be paid for the use of any patent process for the preservation of cloth from moth or mildew."

The above question is understood to arise on the proviso just quoted, and it involves the inquiry as to the effect of the latter upon expenditures for one of the objects enumerated in the appropriation, viz, for "preserving" the stock of clothing on hand. That the proviso prohibits the *payment* of any part of the sum appropriated "for the use of any patent process," for the object mentioned, is very clear, but with this its prohibitory operation seems to end. It does not forbid the application of any patent process to the preservation of the clothing where the use of the process may be obtained without paying therefor or incurring any obligation to pay therefor.

Accordingly, if the use of Cowles's process can be had without charge, directly or indirectly, or without incurring any obligation to pay for such use, I think the appropriation in question may be legally employed in applying the same (*i. e.*, in paying for the mere labor necessary to apply the same) to the preservation of Army clothing.

The papers received with Mr. Crosby's letter are herewith returned.

I am, sir, very respectfully, your obedient servant,
EDWARDS PIERREPONT.

Hon. W. W. BELKNAP,
Secretary of War.

Claim of Thomas L. Higgins.

CLAIM OF THOMAS L. HIGGINS.

It is not competent to the Third Auditor and Second Comptroller of the Treasury to adjust a claim for alleged loss or damage arising on breach of a contract wherein the government undertook to furnish the claimant with transportation "for men and animals employed for the work, also for the necessary subsistence, forage, materials, machinery, and tools." The authority of those officers to settle claims or accounts of any kind against the United States is derivable solely from legislative enactment. The statutory provisions conferring upon them authority in that regard reviewed; and *held* that the authority so conferred does not extend to the settlement of any claims or accounts for compensation for damages (whether the damages were sustained by the loss of property or otherwise) other than such as are of the classes specifically described in those provisions.

DEPARTMENT OF JUSTICE,

September 9, 1875.

SIR: I have examined the papers which accompanied your letter to the Attorney-General of the 30th of November last, in relation to the claim of Thomas L. Higgins.

It appears by these papers that on the 1st of July, 1864, the claimant entered into a contract at Chattanooga, Tenn., with the military authorities of the United States, then in charge of the railroad leading from that point to Atlanta, Ga., by which he undertook to furnish all the cord-wood and cross-ties needed for that road, at specified rates, the delivery thereof to be made at such places and in such quantities as the superintendent of the road should direct. The contract contained, among other provisions, the following: "Transportation to be furnished the undersigned (the claimant) free of cost over the United States military railroad lines for men and animals employed for the work, also for the necessary subsistence, forage, materials, machinery, and tools. * * * Either party has the privilege of terminating this contract by giving thirty days' notice to the other."

The claimant entered upon the performance of the contract, and, while thus engaged, both the railroad and the adjacent country were suddenly abandoned by the Army, and were thereupon reoccupied by the enemy. At the time of the abandonment of the road the claimant had a large quantity of wood and ties already cut and prepared but not delivered,

Claim of Thomas L. Higgins.

which the enemy subsequently destroyed. For this he has since been allowed and paid by the Government the actual expense incurred by him in the cutting and preparation thereof.

His present claim is for compensation for the loss of property employed in performing the contract, consisting of horses, wagons, tools, supplies, &c., which loss was sustained, as he alleges, in consequence of the failure on the part of the military authorities to furnish him with such railroad transportation as was necessary for the removal of the property on the abandonment of the country by the troops. This claim, which is essentially one for damages, is based on an alleged breach of the clause in the contract quoted above, providing that transportation should be furnished him free of cost over the military railroad lines for men and animals employed in the work, &c. It has already been before the Second Comptroller, who, I understand, has rejected it on the ground of want of jurisdiction in the accounting officers of the Treasury to adjust or settle the same. But the Comptroller having since suggested a reference of the matter to this department for an opinion on that point, you have deemed the case of sufficient importance to act on his suggestion, and to submit for the consideration of the Attorney-General the following question: "Is the Government of the United States liable for any loss under the contract; and, if so, can the accounting officers of the Treasury take jurisdiction in the premises?"

I will first consider the question propounded by you in so far as it relates to the competency of the accounting officers (*i. e.*, of the Third Auditor and Second Comptroller of the Treasury) to adjust a claim for loss or damage arising on a breach of the provision in the contract whereby the Government undertook to furnish the claimant with transportation "for men and animals employed for the work, also for the necessary subsistence, forage, materials, machinery, and tools."

Whatever authority those officers are invested with to adjust or settle claims or accounts of *any kind* against the United States, owes its existence to legislative enactment, and can be attributed to no other source. It is proper, then,

Claim of Thomas L. Higgins.

at the outset to examine the statutes prescribing their duties, or conferring upon them powers in reference to this subject.

By section 277 of the Revised Statutes it is provided that "the Third Auditor shall receive and examine all accounts relative to the subsistence of the Army, the Quartermasters' Department, and generally all accounts of the War Department other than those provided for; all accounts relating to pensions for the Army, and all accounts for compensation for the loss of horses and equipments of officers and enlisted men in the military service of the United States, and for the loss of horses and equipments, or of steamboats, and all other means of transportation in the service of the United States by contract or impressment; and, after the examination of such accounts, he shall certify the balances, and shall transmit such accounts, with all the vouchers and papers and the certificate, to the Second Comptroller for his decision thereon."

To the several classes of "accounts" enumerated in this section, which it is the duty of the Third Auditor to receive and examine, may be added the accounts for Quartermaster's stores and subsistence "taken" or "received" by the Army from "loyal citizens in States not in rebellion," for the settlement whereof provision is made by the act of February 18, 1875, chap. 80, entitled "An act to correct errors and to supply omissions in the Revised Statutes," &c.

By section 273 of the Revised Statutes it is made the duty of the Second Comptroller "to examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred."

This, with the above, would seem to comprise all the legislation in force (excluding, of course, any acts that may have been passed by Congress conferring power to settle particular cases) from which authority in the Auditor and Comptroller to settle claims against the government may be derived, and from which authority must be derived to enable those officers to take jurisdiction in the present case.

But of the legislation just referred to it is only material, in this connection, to consider the first clause of the provision quoted above from section 227 of the Revised Statutes, viz: "The Third Auditor shall receive and examine all accounts

Claim of Thomas L. Higgins.

relative to the subsistence of the Army, the Quartermaster's Department, and generally all accounts of the War Department other than those provided for ; " for the question of jurisdiction involved in the matter in hand depends upon whether that clause confers authority to liquidate and settle a claim for compensation for damage by the loss of property founded on a breach of contract with the Quartermaster's Department—the agreement in this case pertaining to that branch of the War Department, and the demand of claimant resting on an alleged breach of such agreement.

Are claims of this sort comprehended by the following words in the clause referred to, viz, "accounts relative to the * * * Quartermaster's Department," or "accounts of the War Department," within the meaning and intent of Congress ? I am inclined to think not. That this language was not meant to include such claims may fairly be inferred from the presence of another clause in the same section, which does provide for the settlement of accounts of that kind to a limited extent, by way of correspondingly enlarging, as it were, the authority of the Auditor. Thus, in the next following clause, it is made the duty of that officer to receive and examine (*inter alia*) "all accounts for compensation for the loss of horses and equipments of officers and enlisted men in the military service of the United States, and for the loss of horses and equipments, or of steamboats, and all other means of transportation in the service of the United States by contract or impressment."

The accounts designated in this clause are accounts for damage by the loss of the property described, as will be seen on reference to sections 3482 and 3483 of the Revised Statutes, which authorize the allowance thereof in the cases and under the circumstances therein mentioned. They are, moreover, accounts for damage so sustained arising in the War Department, and if the first clause of section 277, by virtue of the generality of the language mentioned, extended to accounts of that character (*i. e.*, to accounts for damages arising in the War Department), these same accounts would clearly fall within the scope of that clause, and thus the next clause, in so far as it authorizes the settlement thereof, would be unnecessary. But we are not to regard any part of a

Claim of Thomas L. Higgins.

statute as useless, when taken in connection with other parts of the statute, if it can be made to harmonize with such other parts so as to give it a sensible and intelligent effect. By viewing the first clause spoken of, then, as not extending to claims or accounts for damages arising in the Quartermaster's Department or in the War Department, the necessity for introducing the provision in the second clause spoken of, to enable the Auditor to entertain the particular classes of accounts of that character there designated—in other words, the utility of such provision—is very manifest.

From this examination of the sources of the jurisdiction of the accounting officers, to wit, the statutory provisions giving them authority to settle accounts, I cannot avoid the conclusion that it does not extend to the liquidation and settlement of any claims or accounts for compensation for damages (whether the damages were sustained by the loss of property or otherwise) arising in the War Department, other than such claims or accounts of that character as are specifically mentioned in those provisions; a conclusion which, I may add, accords with the views expressed by several of my learned predecessors in office who had occasion to examine the same subject in connection with statutory provisions of like import. (See opinion of Attorney-General Nelson of May 29, 1844, 4 Opin., 327; opinion of Attorney-General Cushing of June 7, 1854, 6 Opin., 516; also, an opinion of Attorney-General Williams of April 6, 1872.)

That conclusion is, in my judgment, decisive upon the point of jurisdiction involved in the case now before me. The claim here is plainly not within any of the statutory provisions adverted to which authorize the settlement by the Auditor of accounts for compensation for damage in cases therein specifically designated; and as, from its character—being a claim for damage by the loss of property consequent upon an alleged breach of contract—the more general provisions conferring authority upon that officer to receive and examine "all accounts relative to the Quartermaster's Department," or "all accounts of the War Department," &c., do not appear to apply thereto, the result at which I arrive is that the accounting officers of the Treasury have no power to adjust or settle it.

Disposition of Fees Collected from Vessels.

This seems to render unnecessary any consideration of so much of your question as relates to the liability of the United States for damage or loss sustained by the claimant in the manner alleged, and I accordingly express no opinion thereon.

The papers which accompanied your letter are returned herewith.

I have the honor to be, very respectfully,

EDWARDS PIERREPONT.

Hon. W. W. BELKNAP,
Secretary of War.

DISPOSITION OF FEES COLLECTED FROM VESSELS.

In view of the absence of anything in the Revised Statutes indicative of an intent to change the purpose for which the fees enumerated in section 4381 were originally established, or to introduce a new rule of distribution: *Held* that, notwithstanding the revision omits the provision of the act of 1793 regulating the distribution of such fees, they should be distributed, as they have heretofore been, under the rule prescribed by that act.

DEPARTMENT OF JUSTICE,

September 11, 1875.

SIR: In your letter of the 28th ultimo you submit for my consideration the question, "Whether the fees provided for in section 4381 of the Revised Statutes should be paid into the Treasury for the use of the Government, or be distributed as directed in section 34 of the act of February 18, 1793, chap. 8;" observing in this connection that that part of the last-cited section which relates to the distribution of those fees appears to have been omitted from the Revised Statutes.

I am of the opinion that, notwithstanding the omission referred to, the fees should not be paid into the Treasury, but be distributed, as they have heretofore been, under the rule originally prescribed.

When the customs service was first created by Congress, the only provision made for the compensation of the principal officers (the collector, naval officer, and surveyor) was the allowance of certain commissions and fees, among which were included the fees in question; and from that time down to

Payment to Robert B. Lacey.

the present, the fees and commissions received by them (excepting those officers whose compensation is regulated by the act of June 22, 1874, chap. 391) have constituted their chief source of compensation. I perceive nothing in the Revised Statutes which indicates an intent to change the purpose for which the fees enumerated in section 4381 were established in the beginning. As already intimated, they were then authorized to be collected solely with a view to the compensation of the customs officers; and for anything that appears they are still authorized to be collected with a view to the same end.

This being the case, the omission of the provision for distributing those fees could only be of importance in so far as it might be taken to signify a design on the part of Congress to introduce a new scheme of distribution. But in the absence of any express enactment on the subject, it may reasonably be assumed, I think, that there was no such design, that the omission was casual or inadvertent, and that the rule of distribution was meant to remain as it had theretofore been.

The papers which accompanied your letter are herewith returned.

I have the honor to be, very respectfully,
EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

NOTE.—By the act of February 27, 1877, chap. 69, entitled "An act to perfect the revision of the statutes of the United States," &c., the omission of the provision for distribution of the fees referred to in the foregoing opinion was supplied.

PAYMENT TO ROBERT B. LACEY.

Under the provision in the act of March 3, 1875, chap. 131, which reads, "To enable the Secretary of the Treasury to pay Robert B. Lacey, late captain and quartermaster," a certain sum, "as the amount due him as arrearages of pay while on duty and prior to his final discharge," the settlement should take the course appropriate to an account accruing in the Treasury Department, and payment be made by the Secretary of the Treasury without a requisition from the Secretary of War.

Payment of Robert B. Lacey.

DEPARTMENT OF JUSTICE,

September 16, 1875.

SIR: I have considered the questions submitted to me in your letter of the 30th ultimo, arising upon a provision in the deficiency appropriation act of March 3, 1875, chap. 131, which reads thus: "To enable the Secretary of the Treasury to pay Robert B. Lacey, late captain and assistant quartermaster of volunteers, the sum of \$1,043.91, being the amount allowed him by the Second Comptroller, and certified to the Secretary of the Treasury, as the amount due him as arrearages of pay while on duty and prior to his final discharge."

The point on which doubt exists appears to be, whether payment to Mr. Lacey should be made by the Secretary of the Treasury only after a requisition shall have been issued by the Secretary of War, or whether payment should be made without the previous issue of such requisition. The answer to this involves one of the following consequences of a purely administrative character. In the former case the matter would take the course of settlement appropriate to an account pertaining to the War Department; in the latter, it would take the course appropriate to an account accruing in the Treasury Department.

If the answer to the above question depended on the subject-matter of the claim upon which Congress acted, perhaps the first-mentioned course would be proper here. But I think it depends wholly on the specific directions given in the statute as to the mode of payment, and that the subject-matter of the claim is unimportant. Congress having itself passed upon the merits of the claim, and made an appropriation to satisfy the same, has seen fit to provide for making the payment in a special manner; *i. e.*, not according to the ordinary way, which, looking to the subject-matter of the claim, would be through the agency of the Secretary of War. Hence the general provisions of law relating to the settlement or payment of claims originating in the War Department, to which you refer, do not apply.

The statute in question devolves the duty of paying Mr. Lacey upon the Secretary of the Treasury. The effect of this provision is, I conceive, precisely the same as it would

Lands at Mouth of Saginaw River.

be if the original claim had accrued elsewhere than in the War Department; and, viewing it in this light, I am of the opinion that payment should be made by you without a requisition from the Secretary of War, and that, consequently, the last-mentioned course of settlement is the proper one in this case.

I return herewith the papers which accompanied your letter.

I have the honor to be, very respectfully,
EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

LANDS AT MOUTH OF SAGINAW RIVER.

The right of the United States, as owner of lot 3, in section 3, township 14 north, range 5 east, at the mouth of Saginaw River, Michigan, to its proportion of the adjoining soil that has appeared above the surface of the river since 1839 is the same, whether such appearance is owing to alluvial deposits or to a recession of the water.

Rules suggested for determining the extent and boundaries of that portion of said soil which belongs to the United States as owner of said lot. Proprietorship of the adjacent lots is not necessary, nor is any permission from riparian proprietors required, to give the United States a right to erect range lights in the waters of Saginaw River; this is a matter between the United States and the State, and not one that concerns the shore owners.

DEPARTMENT OF JUSTICE,
September 20, 1875.

SIR: In reply to the questions propounded relative to the rights of the United States as proprietor of lot number 3, in section 3, township 14 north, of range 5 east, at the mouth of Saginaw River, Michigan, I have the honor to say:

First. That the right of the United States to its proportion of soil that has appeared above the surface since 1839 is not affected by the question whether it has arisen from gradual accretions to the soil by alluvial deposits or from a recession of the water, the rights by alluvion and dereliction being the same.

Lands at Mouth of Saginaw River.

What each proprietor's right to the newly-acquired lands is must be ascertained by determining what the river boundary was at the time lots 3 and 4 began to be held by several titles. Whichever lot was first conveyed, its owner began, from that moment, to have a claim adverse to the United States to a share of all subsequent accretions.

Under the deed, as its language is quoted, the southeasterly boundary (upon land) extended to the bank of the Saginaw River as it *then* was, whether this point was forty-three chains or at a greater or less distance from the starting-point of that line.

"The Saginaw River" was the monument named in the deed. This will control the course and distance given. But it is by the monument *as it then stood* that we are to be guided. If from any cause, natural or artificial, it has since been removed, our first effort must be to ascertain what was its true location when that deed was delivered, in order to know the terminal point of this boundary. Accretions prior to that time, and subsequent to the grant of one of these lots, might possibly deflect the course of the line from that indicated as it approached the river; but it is not probable that this cause operated to make any material difference in the direction or termination of this line. The river may have then flowed so as to be tangent to the southeasterly boundary line, as delineated upon the plat at one or the other of the riparian points indicated by the lines there drawn, or at some point between them. Indeed, some intermediate point seems more likely to be correct; for it is not apparent how a reservation or conveyance of the whole or a part of lot No. 3 could carry any part of lot No. 4. It clearly could not if owned by a different proprietor.

The letter of Major Hains to you speaks of a *reservation* of the lot by the United States in 1839, while the other communications mention it as *conveyed* to the United States by some grantor, whose language is quoted.

Where the true riparian termination of the southeasterly boundary was and is depends upon facts thus left uncertain. If the United States *reserved* lot No. 3 only, or if that (or a part of it) was conveyed *eo nomine* to the United States (another person owning lot No. 4), it is evident that the

Lands at Mouth of Saginaw River.

southeasterly boundary line could not cross that which divides lots 3 and 4. As the monument must govern course as well as distance, the lot line would have to be followed from the point of intersection "to the Saginaw River." But if land within certain boundaries was either reserved or conveyed, without mention of lots (or of lot lines), then the course indicated would have to be followed till the Saginaw River was reached, provided the grantor owned all the land the line thus protracted would traverse.

This is all matter of *fact*, to be ascertained by examination of deeds and papers, and by inquiry of persons who know where the Saginaw River then flowed.

To determine what of the accretion (or dereliction) belongs to the United States, the ancient line (say, in this instance, that which existed when there was first a different ownership of these lots) upon the river must be measured, and it must be ascertained how many feet each proprietor owned upon this line; then divide the newly-formed river line into equal parts and appropriate to each proprietor as many of these parts as he owned on the old line, as is stated in the letter of the United States district attorney to General Weitzel, and in the opinion from which he quotes, *subject to the modification* there mentioned as to the measurement of sharp projections and indentions (such as appear to be part of the shore of lot No. 4), in which case the general available line on the river ought to be taken.

The purpose is to give to each proprietor a length on the new water line proportioned to his length on the old water line, whether the one be longer or shorter than the other.

It will thus be seen that the point from which the riparian line should now be drawn depends upon a division of the acquired land, and may thus be brought either south or north of the place at which the southeasterly boundary line (if protracted upon the course given, or as a continuation of the division line of lots) would touch the river.

By a division of the alluvion in the manner above stated, the point where the present southeasterly boundary reaches the river is to be ascertained; and from this point, when thus found, the riparian line extends, as near as may be, perpen-

Lands at Mouth of Saginaw River.

dicularly to the course of the stream there, without reference to the direction of the boundary lines on shore.

Second. In reply to the second question, I would respectfully submit that, in my judgment, the United States *have* the right to erect range lights in the waters of the Saginaw River without reference to the ownership of the adjacent lots or any permission from riparian proprietors.

If this be so, any effort to ascertain riparian lines is needless, since these can only become important in case of the erection of wharves, &c., along the shore.

As appears in the cases cited by the district attorney, the title to lands once owned by the United States, bordering upon a navigable river, stops at the stream.

The riparian owner has no right, then, except that of wharfage, &c., which belongs to one owning lands adjoining a river in which the tide ebbs and flows.

The State of Michigan has a right of eminent domain over the soil under its navigable rivers, and it has been held that this soil was not at all granted to the United States, but reserved to the State; but the latest decisions of the supreme tribunal reiterate that the State sovereignty over the beds of navigable streams is only for municipal purposes; never to be so used as to affect the exercise of any national right of eminent domain or jurisdiction.

To amount to an exercise of this national right of eminent domain might require some unequivocal expression of such a purpose, like a law expressly authorizing the placing of range lights at the entrance of Saginaw River; and not the mere passage of an act to appropriate a certain sum for the improvement of that river, which it was proposed thus to expend.

At all events, this is a question between the Federal Government and that of Michigan, and not one that concerns the shore-owners.

Very respectfully, your obedient servant,
EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

Customs Duties.

CUSTOMS DUTIES.

Velvet and ready-made clothing, in which silk is the component material of chief value, but containing cotton, flax, wool, or worsted to the extent of 25 per cent. or over in value, are dutiable at 60 per cent. *ad valorem*. Provisions of schedule H in section 2504 Revised Statutes, and of section 1 in the act of February 8, 1875, chap. 36, considered and construed with reference to the duty upon the articles above described.

DEPARTMENT OF JUSTICE,
September 27, 1875.

SIR: In yours of the 24th instant you call attention to the provisions of the customs duties acts upon articles made of silk (Rev. Stat., sec. 2504, schedule H; act of 1875, chap. 36, sec. 1), and ask an expression of my views "whether *velvet and ready-made clothing*, in each of which silk is the component material of chief value, but containing cotton, flax, wool, or worsted to the extent of 25 per cent. or over in value," are dutiable at 60 per cent. *ad valorem*, or at 50 per cent. *ad valorem*.

The proviso to the first section of the act of 1875 (above) expressly excludes from its operation all articles of *silk* containing cotton, &c., to the extent mentioned as characterizing the articles in question.

We are, therefore, remitted to a consideration of the law as it stood before, which law is contained in schedule H, mentioned above.

The sixth and seventh paragraphs of that schedule, respectively, impose a duty of 60 per cent. *ad valorem* upon "velvets" and "ready-made clothing" of which silk is a component material of chief value. Inasmuch as these articles remain "otherwise provided for" than in the last paragraph of that schedule, the latter has no application to them.

The result is that the rate of tax upon the above *velvets* and *ready-made clothing* is the same as if they had been included in the act of 1875. But such rate is not because of such act, but because of the previously existing policy as to them, for the continuance of which Congress has expressly provided. If Congress had enacted in the proviso to the first section of the act of 1875 "that this rate shall not apply," &c., a diffi-

License and Enrollment of Canal-boats.

culty might have been suggested that does not now exist. But even then it would probably have been held that what was meant thereby was "that, *so far as this act goes*, this rule shall not apply," &c., thus leaving such rate to be fixed by any other act applicable thereto.

With great respect, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

LICENSE AND ENROLLMENT OF CANAL-BOATS.

Under section 4371 Revised Statutes, and the act of April 18, 1874, chap. 110, vessels usually called canal-boats, of more than five tons burden, trading from place to place in a district, or between different districts, on navigable waters of the United States (except such as are provided with sails or propelling machinery of their own adapted to lake or coast-wise navigation, and also such as are employed in trade with the Canadas), are exempt from license or enrollment as well where in the trade in which they are engaged they do not enter a canal of a State, as where their voyages are partly on such navigable waters and partly on a State canal.

The act of 1874 does not contemplate boats employed exclusively on the "internal waters" of a State where the same are not also navigable waters of the United States, nor boats employed exclusively on the "canals of a State." It contemplates boats which are employed on navigable waters of the United States *as well as* on the canals or internal waters of a State.

The rule as to exemption from enrollment or license provided by that act is not confined in its operation to waters within the interior of each State, but extends to any waters coming under the denomination of navigable waters of the United States, irrespective of their geographical location.

DEPARTMENT OF JUSTICE,
October 19, 1875.

SIR: I have considered the following question, submitted to me by Hon. C. F. Burnham, Acting Secretary of the Treasury, on the 23d of August last, in a letter of that date, namely: "Whether under section 4371 Revised Statutes, and the act of April 18, 1874, amending the coasting act of February 18, 1793, vessels usually called canal-boats, of more

License and Enrollment of Canal-boats.

than five tons burden, are required, like other vessels, to be documented as vessels of the United States, if found trading from place to place in a district, or between different districts, on navigable waters of the United States, provided, first, that such canal-boats do not enter a canal; or, second, that they trade in such a manner that the voyage is partly on a canal and partly on navigable waters of the United States."

The meaning and effect of the act of April 18, 1874, cited above, in regard to the licensing of canal-boats, are more easily apprehended, and at the same time more correctly understood, by keeping in view the circumstances or conditions under which such boats were previously required by law to be licensed.

It has been held by the Supreme Court of the United States that the acts of Congress for the enrollment and license of vessels "only require such enrollment and license for vessels employed upon the *navigable waters of the United States.*" (See the case of *The Montello*, 11 Wall., 411.) And in the case just referred to the court observed "that if a river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of a State," and those acts have no application.

The same court has also held that though the limitation of the power of Congress over commerce among the several States, with foreign nations, and with the Indian tribes, necessarily excludes from Federal control all that commerce which is carried on entirely within the limits of a State and which does not extend to or affect other States, yet that where a vessel plying exclusively between places in the same State and only on the internal waters thereof (the same being also navigable waters of the United States), is employed in transporting merchandise of which a portion is destined to places in other States or came from places without the State, such vessel is engaged in commerce between the States, and is subject to the enrollment and license laws of Congress, though she may not be running in connection with, or in

License and Enrollment of Canal-boats.

continuation of, any line of vessels or railway leading to other States. (See the case of *The Daniel Ball*, 10 Wall., 557.)

From these authoritative decisions touching the application of the enrollment and license laws of Congress to vessels engaged in commerce it is very clear that, before the act of April 18, 1874, canal-boats came under the operation of those laws (there being no exemption in their favor of which I am aware prior to that act) when such boats were employed, (1) on navigable waters of the States, (2) as instruments of inter-State or foreign commerce, though plying between places and on waters wholly within the limits of a single State. On the other hand, such boats were not affected by those laws if employed exclusively on the canals constructed by any State, since these cannot, as it would seem, be deemed navigable waters of the United States (see *Veazie vs. Moore*, 14 How., 575); nor if employed exclusively on the internal waters (*i. e.*, on waters entirely within the territorial limits) of a State, unless these waters are also navigable waters of the United States; nor if employed exclusively within the territorial limits of a State, though on navigable waters of the United States, unless they were engaged in commerce between the States or with foreign nations.

Recurring now to the act of April 18, 1874, I find that it provides as follows: "That the act to which this is a supplement shall not be so construed as to extend the provisions of the said act to canal-boats, or boats employed on the internal waters or canals of any State; and all such boats, excepting only such as are provided with sails or propelling machinery of their own, adapted to lake or coastwise navigation, and excepting such as are employed in trade with the Canadas, shall be exempt from the provisions of the said act and from the payment of all customs and other fees under any act of Congress."

It has already been shown that the statutory provisions referred to in this act, according to the construction theretofore placed upon them by the Supreme Court, did not apply to canal or other boats when employed exclusively on the "internal waters" of a State where the same are not also navigable waters of the United States, nor to such boats when employed exclusively on the "canals of any State," as

Licence and Enrollment of Canal-boats.

these are not navigable waters of the United States. Hence boats thus employed could not have been within the contemplation of Congress in passing the act; for, with respect to them, the act has nothing to operate upon. The boats contemplated were obviously those which are employed on navigable waters of the United States *as well as* on the canals or internal waters of a State. But since their employment in inter-State or foreign commerce on the navigable waters of the United States was that alone which rendered them subject to the enrollment and license laws, this employment, it is conceived, was alone meant by Congress to be *essential* to bring them within the act; as it must have been a matter of indifference to that body whether a canal or other boat engaged in such navigation was or was not also employed on a canal of any State or on waters thereof which are not navigable waters of the United States.

I incline, therefore, to the view that a boat answering to the description of a canal-boat, not falling under either of the exceptions contained in the second clause of the act, and which is employed on *navigable waters of the United States*, comes within the act as well where, in the trade in which it is engaged, it may never enter a canal of any State, as where its voyages are partly on such navigable waters and partly on a State canal.

Furthermore, it seems to me that there is no restriction as to the locality of these waters; that is to say, whether they lie within the interior of a State or exterior thereto. This is apparent from the *exceptions* introduced in the second clause of the act, which except from its benefits such boats as are provided with "sails or propelling machinery of their own adapted to *lake or coastwise navigation*," and such boats as are "employed in *trade with the Canadas*." The reference to lake and coastwise navigation in the one case, and the particular trade mentioned in the other, show, I think, that the rule as to exemption from enrollment and license provided by the act was not intended to be limited in its operation to waters within the interior of each State, but was designed to extend generally to any waters coming under the denomination of navigable waters of the United States, irrespective of their geographical location.

District of Columbia 3.65 Bonds.

Accordingly, to the question submitted to me which is stated in the beginning of this communication, I give a negative answer.

I have the honor to be, very respectfully,
EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

DISTRICT OF COLUMBIA 3.65 BONDS.

The faith of the United States is, by section 7 of the act of June 20, 1874, chap. 337, and the amendatory act of February 20, 1875, chap. 94, pledged for the payment of the interest and principal of the bonds known as the 3.65 District of Columbia bonds.

DEPARTMENT OF JUSTICE,
October 22, 1875.

SIR: The question submitted by the President to the Attorney-General is whether "the faith of the United States is pledged to provide for the payment of the interest and principal of the 3.65 District bonds."

That the faith of the United States is so pledged I have no doubt whatever, and I respectfully suggest that the contrary opinions which have been given by some eminently respectable lawyers have resulted from a hasty and superficial examination of the question. The true relation which the District of Columbia bears to the Federal Government seems to have been entirely overlooked.

Under Article I, section 8, clause 17, of the Constitution, Congress has power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

Section 1795, Revised Statutes of the United States, provides that "All that part of the territory of the United States included within the present limits of the District of Columbia

District of Columbia 3.65 Bonds.

shall be the permanent seat of Government of the United States.”

Thus Congress has supreme legislative power over the District of Columbia, a power which has never been delegated to any local municipality. Congress exercises direct, exclusive, and absolute legislative authority over the District.

Congress fixes the rate of taxation, declares what property shall be subject to or exempt from taxes in the District, and prescribes the mode of assessment and the enforcement of collection of the taxes imposed. (See the act of Congress approved March 3, 1875, entitled “An act for the support of the government of the District of Columbia for the fiscal year ending June 30, 1876, and for other purposes.”)

The Treasury of the United States is by law the sole depository of the taxes and revenues of the District. The debt for which Congress authorized the issue of these bonds was made by officers of the *United States*, whom the *President* had appointed and whom the Senate had confirmed, and the debt was contracted chiefly for improving the streets, avenues, and sewers of the District, which are the exclusive property of the United States. (*Van Ness vs. City of Washington*, 4 Peters, 232.)

Had there been no specific pledge on the part of the Government, it would have been bound upon every principle of law, good faith, and common honesty to pay the interest and principal of these bonds. The debt was incurred by its own officers, the money borrowed was expended for the improvement of its own property, under its own direction.

But on the 20th of June, 1874, Congress passed an act which provides in the seventh section for the issue of the “District 3.65 bonds,” and, to leave no doubt about the liability of the Government, the act of February 20, 1875, was passed, entitled “An act to amend an act entitled ‘An act for the government of the District of Columbia, and for other purposes, approved June 20, 1874.’”

“SEC. 7. That the sinking-fund commissioners of said District are hereby continued; and it shall be the duty of said sinking-fund commissioners to cause bonds of the District of Columbia to be prepared in sums of fifty and five hundred dollars, bearing date August first, eighteen hundred

District of Columbia 8.65 Bonds.

and seventy-four, payable fifty years after date, bearing interest at the rate of three and sixty-five one-hundredths per centum per annum, payable semi-annually, to be signed by the secretary and the treasurer of said sinking-fund commissioners and countersigned by the comptroller of said District, and sealed as the board may direct, which bonds shall be exempt from taxation by Federal, State, or municipal authority; engraved and printed at the expense of the District of Columbia, and in form not inconsistent herewith; *and the faith of the United States is hereby pledged that the United States will, by proper proportional appropriations as contemplated in this act, and by causing to be levied upon the property within said District such taxes as will do so, provide the revenues necessary to pay the interest on said bonds as the same may become due and payable, and create a sinking-fund for the payment of the principal thereof at maturity.* Said bonds shall be numbered consecutively and registered in the office of the comptroller of said District, and shall also be registered in the office of the Register of the Treasury of the United States, for which last-named registration the Secretary of the Treasury shall make such provision as may be necessary; and said commissioners shall use all necessary means for the prevention of any unauthorized or fraudulent issue of any such bonds. And the said sinking-fund commissioners are hereby authorized to exchange said bonds at par for like sums of any class of indebtedness in the preceding section of this act named, including sewer taxes or assessments paid, evidenced by certificates of the auditing board provided for in this act."

The act still further provides that "*The interest of all said bonds shall be payable at the Treasury of the United States.*"

Section 7 reads: "And the faith of the United States is hereby pledged that the United States will * * * provide the revenues necessary to pay the interest on said bonds *as the same may become due and payable*, and create a sinking-fund for the payment of the principal thereof at maturity."

The fact that the act points out the means, over which the United States has the absolute power, to provide the revenues to meet these obligations only strengthens the pledge of faith which the Government gives.

DISTRICT OF COLUMBIA 3.65 BONDS.

It was never yet imagined that the obligation of the Government was relaxed or its faith less securely pledged when it obtained loans in 1842 and subsequently, and pledged the proceeds of public lands and the customs revenues to secure the payment of those loans, because of the mention of those resources of the nation.

The faith of the United States is clearly pledged to the payment of the *interest* on these "3.65 District bonds" as the same falls due, and to the payment of the principal of the bonds when the same mature.

There is no way short of the shameless violation of the clearest principles of settled law and honest dealing that the Government can escape from the full payment of these bonds.

First. The United States themselves contracted the debt for which the bonds were given.

Second. The United States used the money or labor for which these bonds were given to improve their own property.

Third. The United States themselves authorized the issue of these bonds to secure their own debt.

Fourth. The United States, by specific act of Congress, pledged the faith of the nation for the full payment of these bonds, and thus induced innocent holders to take the same and part with value.

Fifth. The United States, to give additional credit to these bonds, pointed out the very ways and means by which they would securely provide the revenues to meet the interest and principal; the Government having absolute control over the ways and means suggested.

Sixth. The United States still further added to its pledge and strengthened confidence in its plighted faith by providing in the same act of February 20, 1875, that "*the interest of all said bonds shall be payable at the Treasury of the United States.*"

If the faith of the United States is not pledged to the payment of both principal and interest of these bonds as the same mature, then the United States have never pledged their faith for any debt.

It is entirely clear that if any individual stood in the same relation towards the bondholders which the United States

Effect of Pardon.

now holds, he could be forced in any court of law to pay the honest holders of these bonds.

It is not of the smallest consequence whether you treat the United States as guarantors that the revenues shall be raised in a particular way to meet the bonds, or as directly responsible to the holders. If the United States are considered as guarantors of the revenues, it comes to the same thing; they agree that certain means under their absolute control shall be employed to raise the necessary revenue, and thus pledge that the revenues *shall be raised*; the force of the obligation is thereby increased.

I have the honor to remain, your very obedient servant,
EDWARDS PIERREPONT.

The PRESIDENT.

EFFECT OF PARDON.

To satisfy the requirement of the statute which makes "the loyalty of the claimant" an essential element in a claim presented under the act of July 4, 1864, chap. 240, in order to warrant a recommendation for settlement thereof, proof of a pardon is sufficient.

DEPARTMENT OF JUSTICE,
October 26, 1875.

SIR: In reply to your inquiry as to the effect of the oath of allegiance upon subsistence claims presented under the act of July 4, 1864, chap. 240, § 3 (13 Stat., 381, 382), I would respectfully reply that that act relates to subsistence furnished in States *not* in rebellion, *i. e.*, whose citizens are not assumed to be belligerents; hence the property is not enemy's property, nor taken as such. If there be a refusal to pay for it, it must be on account of the personal conduct of its owner toward the Government in rendering aid and comfort to those in arms against it; an offense which the President has power to pardon, by extending his clemency to each guilty individual, or by a general amnesty to a whole class.

The Commissary of Subsistence must be "convinced that the claim is just and of the loyalty of the claimant" before he can report the claim with a recommendation of settlement. *How* is he to be "convinced" of the facts first to be found be-

Naval Officer in Merchant Service.

fore he can recommend payment. Clearly, by *evidence*. He is, *pro hac vice*, the tribunal to determine whether or not the basis of a legal claim against the United States exists. Then he should proceed in the ordinary manner of investigating facts. Among these facts, prominent is that of the loyalty of the claimant. A pardon is introduced as evidence of it. True, this shows that guilt has once existed, but, at the same time, that it has been entirely blotted out, "so that in the eye of the law the offender is as *innocent* as if he had *never committed* the offense." He is restored to his civil rights, among which is that of claiming from his government compensation for his property used by it. Property seized and condemned for whatever cause is not restored by a pardon, nor is any right to compensation thereby conferred, nor, if taken and sold under a valid decree and its proceeds paid into the Treasury, can its value be obtained; but if taken for military use, with an intention of payment upon proof of loyalty, that condition is satisfied and that proof is made as completely by a pardon as in any other manner. Such is the effect of the decision of the Supreme Court. It is believed that this is a comprehensive answer to the several questions propounded.

Very respectfully, your obedient servant,

EDWARDS PIERREPONT.

The SECRETARY OF WAR.

NAVAL OFFICER IN MERCHANT SERVICE.

A naval officer cannot lawfully serve as master of a private steam-vessel in the merchant service without having previously obtained the license required by section 4438 of the Revised Statutes, although he may be eligible, by virtue of his commission, to take command of a steam-vessel of the United States in the naval service.

DEPARTMENT OF JUSTICE,

October 26, 1875. .

SIR: A commander in the United States Navy, in order to justify him in assuming the position of master of a merchant steam-vessel, should procure the license required by the Revised Statutes, sections 4438 and 4439.

The United States vessel which Commander Philip's com-

Suspension of Officers.

mission entitles him to command is a vessel owned by the United States in the naval service, and not one owned by citizens of the United States in the merchant service. To command the latter, the laws specially relating to that subject must be referred to and complied with.

Very respectfully, yours,

EDWARDS PIERREPONT.

The SECRETARY OF THE TREASURY.

SUSPENSION OF OFFICERS.

An order of the President suspending an officer, under section 1768 Rev. Stat., takes effect upon due notice thereof to the officer, unless by the terms of the order it is to take effect at a stated time after notice. Receipt of the order by the officer is due notice.

Where an officer is suspended, but continues afterwards to perform the duties of the office (there being no one at the time authorized to enter upon the performance of such duties), his acts are those of an officer *de facto*, and are valid so far as they concern the interests of the public.

DEPARTMENT OF JUSTICE,
November 20, 1875.

SIR: In your communication of the 6th instant, you state that on the 28th of April last, during a recess of the Senate, the President issued an order suspending the receiver of public moneys at Dardanelle, Ark., and at the same time designated a person to perform the duties of that office temporarily; that the person so designated has failed to qualify and enter upon the performance of the duties of the office; that those duties have in the meantime been performed by the officer suspended, &c.; and, in connection with these facts, you present for my opinion the following questions:

"First. When do the official acts of an officer suspended under the provisions of section 1768 cease and determine; upon the receipt by him of the order of suspension, or upon the qualification of his successor in the manner required by section 1768 and also by section 2236?

"Second. If the order of suspension takes effect upon its receipt by the officer suspended, what steps are necessary and can be taken to legalize the acts performed by such officer since the order of suspension?"

Distribution of Prize Money.

In reply to your first question, I answer that an order issued by the President under section 1768 of the Revised Statutes, suspending an officer, takes effect upon due notice of such suspension, and that the receipt of such order by the officer is due notice; and if the order of suspension does not in terms limit the time at which the order is to take effect, it operates from the date of service of such order. An officer thus suspended is not entitled to pay after his suspension; and if he continues to exercise the duties of the office and perform its functions, there being no one else authorized at the time to perform them, his acts are the acts of an officer *de facto*, which on grounds of public policy and necessity are deemed to be valid so far as they involve the just interests of third persons and the public, and such acts of a *de facto* officer, acting within the scope of his office, are valid and binding, in the absence of fraud or notice of irregularity.

I have the honor to remain, your very obedient servant,
EDWARDS PIERREPONT.

Hon. Z. CHANDLER,
Secretary of the Interior.

DISTRIBUTION OF PRIZE MONEY.

The words, "their respective rates of pay in the service," as used in section 10, paragraph numbered "fifth," of the prize law of June 30, 1864, chap. 174, signify the rates of pay actually established, and to which the parties concerned were entitled, at the time of the capture of the prize.

Accordingly, the promotion of a naval officer to whom prize-money is distributable under said paragraph, conferred after the date of the capture of the prize, cannot affect the distribution of the fund, even though by the promotion he became entitled to increased pay from and including that date. In such case the rate of pay which the officer was in receipt of when the capture was made, not the increased pay resulting from the promotion afterwards bestowed, is the measure of his allowance under that provision.

The commander of a single ship is by the prize law aforesaid restricted to one-tenth or three-twentieths (as the case may be) of the prize-money awarded to his vessel, and cannot share according to his rank, where that would give him more.

Distribution of Prize Money.

DEPARTMENT OF JUSTICE,
December 10, 1875.

SIR: Your letter of the 9th of June last, in relation to the distribution that has already been made of the prize-money adjudged to the captors of the rebel ram Albemarle, submits for my consideration the following questions which have arisen since such distribution, namely:

"First. Were our Navy officers, in October, 1864, who were promoted to take rank on a certain day then past, entitled to the pay of the promoted rank, provided they were doing duty in such rank? If so, are officers who are entitled to prize-money in proportion to their pay so entitled in proportion to the pay of the increased rank?"

"Second. Is the commander of a single ship limited to one-tenth of all the prize-money awarded his ship, if the amount to which he would be entitled, if paid according to his rank, exceeded such one-tenth?"

"Third. Is picket-boat No. 1, as at the time of the destruction of the Albemarle, to be considered either in fact or under the decree of the court a 'single ship,' under the command of 'a commanding officer of a fleet or squadron'?"

The first question contains two distinct branches, which it is thought expedient to deal with here in their inverse order. The answer to the latter of these branches depends upon the meaning and effect of the statutory provision, requiring a certain portion of the proceeds of a prize to be distributed "among all others doing duty on board * * * and borne upon the books of the ships in proportion to their respective rates of pay in the service." (See prize law of 1864, 13 Stat., 310.) But the only terms of this provision which it is material to consider in this connection are the words "their respective rates pay in the service." What is meant thereby?

I think these words signify the rates of pay actually established and to which the parties concerned were entitled *at the time of the capture of the prize*. Had the condemnation and distribution in the case of the Albemarle accrued prior to the promotion of any of those who took part in the capture, it is very clear that an apportionment of the prize proceeds among such of the captors as came under the operation

Distribution of Prize Money.

of the above-mentioned provision, based upon their respective rates of pay in the service *at the time of the capture*, would have been in exact conformity with the rule of distribution prescribed in that provision.

What would have constituted, under the said provision, a basis for an apportionment *then*, must be deemed to be equally such, under the same provision, at a more remote period, whatever alteration in the condition of any of the captors, in regard to grade or pay, may have taken place in the meantime. The rule of distribution adverted to is not liable to be varied, as I conceive, either to augment or diminish any of the individual interests or shares of the captors relatively to each other, by circumstances affecting the rank or compensation of some of the captors which may arise subsequently to the capture of the prize, or, indeed, by anything short of a legislative enactment plainly authorizing it.

Regarded from this point of view, the promotion of a naval officer to whom prize-money is distributable in proportion to his pay, where it has been conferred after the date of the capture of the prize, can have no effect whatever upon the distribution of the money, though by the promotion he became entitled (we will suppose) to increased pay from and including that date. The rate of pay which such officer was in receipt of *when the capture was made* is the measure of his allowance out of the prize proceeds, not the increased pay resulting from the promotion afterwards bestowed upon him.

Accordingly, the latter branch of your first question is answered in the negative; and it is presumed that this answer renders unnecessary any response to the other branch of the same question.

Answering your second question in the same general terms in which it is stated, I say yes. The prize law above cited gives to the "commander of a single ship," under some circumstances *one-tenth*, and under others *three-twentieths*, of the prize-money awarded to his vessel; and, there being no other provision made for him out of the prize-money so awarded, he is of necessity restricted to the one-tenth or the three-twentieths, as the case may be. He cannot, therefore, share "according to his rank," where that would give him more than the proportions just mentioned.

DISBURSEMENT OF FUNDS FOR INDIAN AGENCIES.

Your third inquiry appears to involve two questions: first, whether "picket-boat No. 1" was at the time of the capture a "single ship" within the meaning of the provision in the prize law just referred to; second, whether it was then under the command of "a commanding officer of a fleet or squadron?" The latter of these is purely a question of fact, and, as such, inappropriate for the consideration of the Attorney-General. Its solution may readily be had, I imagine, by reference to the records of the Navy Department. With respect to the former, the papers submitted do not contain sufficient information to enable me to reach a satisfactory conclusion on the subject. By the decree of the court, the prize was awarded solely to the vessel mentioned; but this determines nothing in relation to the real point presented, which is, whether that vessel should be considered a "ship" or not, under the provision of the prize law to which reference is above made. This point seems to require for its intelligent consideration something more definite and specific touching the description of the boat, its size, character, complement of officers and men, &c., than is found in the papers before me.

The papers received with your letter are herewith returned.

I have the honor to be, very respectfully, your obedient servant,

EDWARDS PIERREPONT.

Hon. GEORGE M. ROBESON,
Secretary of the Navy.

DISBURSEMENT OF FUNDS FOR INDIAN AGENCIES.

Under sections 2058 and 2089 Rev. Stat., the President may, in his discretion, devolve the disbursement of funds for the Indian agencies within a superintendency upon the superintendent thereof or upon the several Indian agents within the same superintendency.

DEPARTMENT OF JUSTICE,
December 15, 1875.

SIR: I have the honor to acknowledge the receipt of your letter of the 13th instant, inclosing a copy of a communication addressed to you by the Commissioner of Indian Affairs, and calling my attention to the recommendation of the latter,

Claim of Illinois Central Railroad Company.

that "the funds of the several agencies in the Central Superintendency be remitted directly from the Treasury to the several agents thereof" for disbursement, instead of to the superintendent of the agency, as has heretofore been done.

You request my opinion upon substantially this question: "Whether the proposed change in the mode of disbursing such funds would be in conformity with law?"

I have examined the provisions of section 2089 of the Revised Statutes, cited by you and by the Commissioner, and also in connection therewith section 2058 of the Revised Statutes. While the former section leaves it entirely discretionary with the President to require or not to require the superintendent to make the disbursement referred to, the latter section clearly authorizes him to devolve that duty upon the several Indian agents within the superintendency, should he deem it expedient so to do.

I am accordingly of the opinion that there is no legal impediment or objection to the proposed change.

I am, sir, very respectfully, your obedient servant,
EDWARDS PIERREPONT.

Hon. Z. CHANDLER,
Secretary of the Interior.

CLAIM OF ILLINOIS CENTRAL RAILROAD COMPANY.

The amount of taxes illegally collected from the Illinois Central Railroad Company from 1863 to 1866, as income tax upon dividends on stock held by non-resident aliens, should be repaid to that company, after deducting so much therefrom as has already been paid over to the stock-holders lawfully entitled thereto.

DEPARTMENT OF JUSTICE,

December 29, 1875.

SIR: By yours of the 9th instant it appears that the Illinois Central Railroad Company claims from the Treasury the refunding of \$176,251.37, on the ground that it was paid in 1863, 1864, 1865, 1866 as a tax on dividends of stock held by non-resident aliens, and you ask the opinion of the Attorney-General upon the following questions:

Claim of Illinois Central Railroad Company.

First. "Whether if, in fact, the tax was withheld from the stockholders, the same can lawfully be refunded to the company on its showing that the stockholders on whose account the tax was paid were non-resident aliens at the time the dividend was declared, and so not subject to income tax, without first showing that the amount of tax so withheld from such persons has since been paid to them by the company, and without also showing participation by those persons in the reclamation of the tax?"

Second. "Whether the payment of the dividend tax in question from any fund or other money of the company was not *ipso facto* the dividing and setting apart of the amount so paid as tax to the use of the particular individual stockholders, who were such at the date of the dividend, and, therefore, a dividend to those stockholders, and its payment to the Government a payment for and on account of the individual stockholders as part of their income tax?"

Third. "If it be shown that the tax was paid by the company from moneys not otherwise divided, should the tax paid be refunded to the company simply on proof of the non-resident alienage of the stockholders on whose account it was paid?"

From the papers submitted, it appears that no question is raised about the statute of limitations or the liability of the Government to repay \$176,251.37 of money unlawfully collected as income tax. The sole question presented is, whether the money ought to be repaid to the Illinois Central Railroad Company, from which it was illegally taken, or to certain stockholders of that company, to whom it rightfully belonged, and who would have received it, but for the action of the Government in demanding payment of it by the company.

This money was claimed and received by the United States as income tax upon dividends on stock (held by non-resident aliens) made by the Illinois Central Railroad Company in the years 1863, 1864, 1865, 1866.

Subsequently the courts of the United States declared it illegal to exact this tax upon dividends of stock belonging to aliens not resident in this country. (*Railroad Company vs. Jackson*, 7 Wall., 262.)

The officers of the company are trustees of the stockholders,

Claim of Illinois Central Railroad Company.

and they held the money earned in trust for the owners of the stock, after the payment of all legal claims against the company.

The officers of the road were bound to pay over the dividends earned to the stockholders, and they had no right to withhold five per cent., or any other sum, for any illegal purpose; and, if so withheld, the stockholders might sue for and recover the same against the road.

These alien stockholders can recover of the company any money to which they have a lawful right, and which the company refuses to pay; and the corporation cannot defend itself in a court of law against the claim on the ground that the company has paid out the money upon some unlawful exaction, and especially after the payment has been declared illegal by the highest tribunal.

The Government unlawfully exacted the money from the railroad company, and it should be paid back to the company from which it was unlawfully taken. The non-resident alien stockholders can recover it of the corporation, which, as I understand, is perfectly solvent; and it will be no defense for the company to plead that through negligence, ignorance, delay, or other illegal act it has lost the money.

The right of the railroad company to repayment of the money which it paid the Government under an illegal exaction, does not depend upon whether it has first paid the money to the stockholders. The Government cannot by unlawful demands deprive the trustee of property which he holds in trust for another, and, when asked to repay it, insist that the trustee must first pay the *cestui que trust* the very money of which the Government has deprived him. If it appears on the adjustment that the Government has already paid back a part of this money to stockholders lawfully entitled to the same, so much can be deducted and the balance paid over to the road.

I have the honor to remain, your very obedient servant,
EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

*Transportation of the Mail.***TRANSPORTATION OF THE MAIL.**

Sembler that it is a violation of section 5474, Rev. Stats., for a mail contractor to employ an express company not under his control to carry mail matter committed to his charge.

DEPARTMENT OF JUSTICE,
December 29, 1875.

SIR: I herewith return the various papers which accompanied your letter of the 20th instant. It does not very clearly appear whether the matter conveyed by express was mail matter at the time it was so conveyed; of this fact your department will be the judge.

Assuming that it was mail matter, and that the contractor did voluntarily quit the same before delivering it into the post-office at the termination of the route, or to a person "authorized to receive the same," under the law, then he violated section 5474 of the Revised Statutes. The contractor had no right to employ an express company not under his control to carry the mail.

Some unforeseen accident, such as the breaking down of a mail coach, would make it proper to employ some other mode of transporting the mail for the time being; but that would not authorize the contractor to put the mail in possession or custody of persons not authorized to receive it.

It is the obvious intent of the law that from the time the mail is taken in charge, at the beginning of the route, until delivered at the termination thereof, it shall not be placed in the custody of any person not "authorized to receive the same."

For any such violation of the law the Postmaster-General might, if he thought fit, annul the contract; or, under section 3962, he might impose a fine.

This seems to be a case where, under all the circumstances, the Postmaster-General may exercise his discretion, and judge, from the facts in his possession, whether the matter spoken of was in fact "mail matter" or not, and whether, in point of fact, the contractor did voluntarily quit the mail matter after he received it and before he delivered it at the destined post-office.

I have the honor to remain, your very obedient servant,
EDWARDS PIERREPONT.

Hon. MARSHALL JEWELL,
Postmaster-General.

Official Compensation.—Removal of Wreck.

OFFICIAL COMPENSATION.

Where a special agent of the Post-Office Department, in receipt of a fixed compensation, performed services as a deputy marshal: *Held* (upon consideration of section 1765 Rev. Stat.) that he cannot be allowed, in respect of such services, anything beyond *actual expenses* incurred.

DEPARTMENT OF JUSTICE,

January 4, 1876.

SIR: I return herewith the letter of Mr. J. P. Underwood, special agent of the Post-Office Department, some time since referred by you to me, and, in answer to your request indorsed thereon, I have the honor to state that, in my opinion, Mr. Underwood cannot be paid for his services as deputy marshal anything beyond the *actual expenses* incurred by him while in the performance of such services, if (as I understand the case to be) he was then also an officer of the Post-Office Department, in receipt of a fixed compensation. (See Rev. Stat., sec. 1765.)

I am, sir, very respectfully, your obedient servant,
EDWARDS PIERREPONT.

Hon. MARSHALL JEWELL,
Postmaster-General.

REMOVAL OF WRECK.

Where a vessel put into harbor "in a furious storm," and, leaking badly, was run ashore, thereupon becoming a wreck, which forms an obstruction to navigation: *Held* that (the wreck appearing to have been caused by stress of weather, and not through any fault or misconduct on the part of the master and crew) the owners of the vessel are under no legal obligation to remove it, and that the case does not warrant the institution of proceedings to that end against them.

DEPARTMENT OF JUSTICE,

January 4, 1876.

SIR: I have the honor to return herewith the papers which accompanied your letter of the 27th of November last, in relation to the removal of the wreck of the City of Buffalo, lying within the Harbor of Refuge, Sand Beach, Lake Huron, in the State of Michigan.

It appears by these papers that the vessel mentioned had

Duty on Carpet Wools.

put into the said harbor "in a furious storm," while leaking badly, and was run ashore where the wreck now lies.

Inquiry is made whether the owners of the vessel can be compelled to remove the wreck; and, if so, you request that instructions be given the district attorney to institute proceedings to that end.

Though the wreck may be a serious obstruction to navigation, yet as it would seem to have been caused by stress of weather, and not by any default or misconduct on the part of those in charge of the vessel, I doubt whether the law imposes upon the owners any duty or obligation to remove it. As was observed by Mr. Justice Maule, in *Brown vs. Mallett* (5 C. B., 618), where navigation has become obstructed by a vessel which has been sunk and lost to the owner without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity in addition to his share of a public inconvenience; and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil.

As at present advised, therefore, I do not think the case is one which warrants the institution of proceedings against the owners.

I am, sir, very respectfully, your obedient servant,
EDWARDS PIERREPONT.

Hon. W. W. BELKNAP,
Secretary of War.

DUTY ON CARPET WOOLS.

Carpet wools valued at 12 cents or less per pound, exclusive of charges at the last port of shipment, are dutiable under section 2504 Rev. Stat., schedule L, at the rate of 3 cents per pound.

DEPARTMENT OF JUSTICE,
February 26, 1876.

SIR: The legal question which yours of the 2d instant propounds is, "What amount of duty should be exacted upon 'carpet wools,' the cost of which, exclusive of the charges at the last port of shipment, is 12 cents or less per pound, but,

Duty on Carpet Wools.

with the addition of such charges, is over 12 cents per pound?" The answer to this question depends entirely upon the true construction of the tariff acts in force at the time the customs duties are exacted.

The confusion in the case arises from the clumsy mode in which the legislative intent is expressed in the statutes; but a careful examination makes it clear that the law is, that such wools pay a duty of 3 cents per pound, and no more.

The Revised Statutes do not purport to contain any new legislation. The object of the revision was to consolidate the statutes then existing. The title is, "An act to revise and consolidate the statutes of the United States in force on the first day of December, 1873."

On the 1st of December, 1873, there was no act in force which allowed an increase of dutiable value of carpet wools by adding charges at the port of shipment. The only act then in force touching such duties was the act of 1867 (14 Stat., 559), which imposed a duty of 3 cents per pound upon wools valued at 12 cents or less per pound, *excluding charges* in the port of shipment.

In 1866 (14 Stat., 330), it was enacted that the dutiable value of imported merchandise should be determined by adding to its cost or market price the cost of transportation, port charges, commissions, &c., with the *proviso* "that nothing herein contained shall apply to long-combing or carpet wools costing 12 cents or less per pound, unless the charges so added shall carry the cost above 12 cents per pound, in which case one cent per pound duty shall be added."

This provision was repealed by the statute of 1867, but the revisers, when consolidating the statutes, evidently did not observe that it had been repealed, and in section 2908 the commissioners placed the proviso in the statute of 1866 again in the law.

This apparently did not attract the attention of Congress until the last day of the action of the House of Representatives on the revision, as appears by Congressional Record, first session, Forty-third Congress, vol. 2, part 3, page 2712, when the following was inserted :

"*Provided*, That this and the preceding section shall not be construed as impairing the provisions relating to duties on

Compensation for Carrying the Mail.

the several classes of imported wools contained in section 2504, under schedule L." (Rev. Stat., sec. 2908.)

Turning to section 2504, under schedule L, we find "wools of the third class, the value whereof at the last port or place whence exported into the United States, excluding charges in such port, shall be 12 cents or less per pound, 3 cents per pound."

This leaves the legislative intent entirely clear, however awkward the mode of expressing that intent may be. But if there were any doubt, the rule of construction is that no tax or burden can be levied upon the property of a citizen except through a plain manifestation of the legislative will, and conflicting provisions of law are to be construed in favor of the citizen. This is well expressed in the recent case of *Farmers' Bank vs. Hale*, 59 N. Y., 53: "When the intent and meaning of a statute is expressly declared by a provision therein, to carry out that intent all other parts of the act must yield."

A proviso in an act "repugnant to the purview thereof is not void, but stands as the last expression of the legislative will."

A careful examination of the Revised Statutes as they now stand makes it clear that the legislature intended to have the duty on carpet wools remain as mentioned in section 2504, schedule L, and hence the lawful duty upon such wool is 3 cents per pound.

I have the honor to remain, your very obedient servant,
EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

COMPENSATION FOR CARRYING THE MAIL.

The Pittsburg, Cincinnati and Saint Louis Railroad Company is entitled to nothing for mail service beyond what has been paid thereto according to established usage prior to July 1, 1873. But having protested against the continuance of that method of adjustment after July 1, 1873, claiming compensation in accordance with the terms of the act of March 3, 1873, the company is entitled for this period to compensation as claimed.

Allowances to Special Agents of Post-Office Department.

DEPARTMENT OF JUSTICE,

March 6, 1876.

SIR: Without going into the details of the account of the Pittsburgh, Cincinnati and Saint Louis Railroad Company, transmitted with your favor of the 1st instant, it appears to me, upon as careful examination as the extraordinary pressure of other business at this time would allow, that the conclusions to which the Assistant Attorney-General for your Department came are correct, that the corporation, waiving all discussion of what its rights might otherwise have been, are concluded by the action of its officers and agents in the course of its dealings with your Department *prior* to July 1, 1873, and cannot justly claim anything additional to what has been paid according to established usage to that date; but that, protesting against the continuance of that method of adjustment and claiming compensation *after* July 1, 1873, in accordance with the terms of the act of March 3, 1873, they are entitled thereto.

Very respectfully, your obedient servant,

EDWARDS PIERREPONT.

Hon. MARSHALL JEWELL,
Postmaster-General.

ALLOWANCES TO SPECIAL AGENTS OF POST-OFFICE DEPARTMENT.

Special agents employed by the Postmaster-General under section 4017, Rev. Stat., are entitled to an allowance for traveling and incidental expenses, within the limit there prescribed, only while they are actually employed in the service.

DEPARTMENT OF JUSTICE,

March 10, 1876.

SIR: The statute submitted for my construction is the following: "The Postmaster-General may employ two special agents for the Pacific coast, and such number of other special agents as the good of the service and the safety of the mail may require. Such agents shall be entitled to a salary at the rate of not more than one thousand six hundred dollars a year each, and shall each be allowed for traveling and inci-

Duty on Carpet Wools.

dental expenses, while actually employed in the service, a sum not exceeding five dollars a day." (Rev. Stat., sec. 4017.)

There hardly seems any room for the construction of this statute; its language is plain, its meaning is apparent. The Postmaster-General has a right to allow each of these agents for "traveling and incidental expenses, while actually employed in the service," any sum to cover "traveling and incidental expenses" not exceeding \$5 a day.

An agent not actually employed in the service is not entitled to any traveling and incidental expenses; but while actually employed he is entitled to those expenses within the limit prescribed by statute.

There is nothing ambiguous about the law, and no opportunity but for one plain and simple construction.

Custom has nothing to do with the question; it is a matter purely of statute law, too plain to be misunderstood.

I have the honor to remain, your obedient servant,
EDWARDS PIERREPONT.

Hon. MARSHALL JEWELL,
Postmaster-General.

DUTY ON CARPET WOOLS.

The subject of the duty on carpet wools re-examined, and the opinion of February 26, 1876—namely, that under the law, as it is contained in section 2504, Rev. Stat. (with which is to be considered the proviso under section 2908 Rev. Stat.), carpet wools, whose value at the port of exportation, exclusive of the charges there, is not above 12 cents per pound, pay no higher rate of duty than 3 cents per pound—reaffirmed.

DEPARTMENT OF JUSTICE,
March 14, 1876.

SIR: The further question submitted to me in the wool case is presented in the following paragraph of your letter : dated the 3d instant:

"This Department finds it necessary to consider the further question whether charges other than those incurred at the last port of shipment shall be included in such value for the purpose indicated.

"It is to be observed that the charges enumerated in sec-

Duty on Carpet Wools.

tion 9 of the act of July 28, 1866 (reproduced in sections 2907 and 2908 of the Revised Statutes), which enter as an element into the dutiable value of imported merchandise, embrace not only such as are or may be incurred at the last port of shipment to the United States, but also certain other charges which under certain circumstances may be incurred elsewhere than at such port; as, for instance, the cost of inland transportation to such port."

The ninth section of the act of July 28, 1866, is in these words:

"*And be it further enacted*, That in determining the dutiable value of merchandise hereafter imported, there shall be added to the cost, or to the actual wholesale price or general market value at the time of exportation in the principal markets of the country from whence the same shall have been imported into the United States, the cost of transportation, shipment, and transhipment, with all the expenses included from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such goods are contained; commission at the usual rates, but in no case less than two and a half per centum; brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment, and all charges of a general character incurred in the purchase of a general invoice shall be distributed *pro rata* among all parts of such invoice, and every part thereof charged with duties based on value shall be advanced according to its proportion, and all wines or other articles paying specific duty by grades shall be graded and pay duty according to the actual value so determined: *Provided*, That all additions made to the entered value of merchandise for charges shall be regarded as part of the *actual value* of such merchandise, and if such addition shall exceed by ten per centum the value so declared in the entry, in addition to the duties imposed by law, there shall be levied, collected, and paid a duty of twenty per centum on such value: *Provided*, That the duty shall in no case be assessed upon an amount less than the invoice or entered value: *Provided further*, That nothing herein contained shall apply to

Duty on Carpet Wools.

long-combing or carpet wools costing twelve cents or less per pound, unless the charges so added shall carry the cost above twelve cents per pound, in which case one cent per pound duty shall be added."

By the act of March 2, 1867 (14 Stat., 559), it was enacted:

"That from and after the passage of this act, in lieu of the duties now imposed by law on the articles mentioned and embraced in this section, there shall be levied, collected, and paid on all unmanufactured wool, hair of the alpaca, goat, and other like animals, imported from foreign countries, the duties hereinafter provided. All wools, hair of the alpaca, goat, and other like animals, as aforesaid, shall be divided, for the purpose of fixing the duties to be charged thereon, into three classes, to wit:

* * * * *

"CLASS 3.—*Carpet wools, and other similar wools.*"

* * * * *

"Upon wools of the third class, the *value whereof* at the last port or place whence exported into the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three cents per pound; upon wools of the same class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed twelve cents per pound, the duty shall be six cents per pound."

Thus the act of 1866 was repealed by that of 1867, and the duty upon imported wools was such, and such only, as was imposed by the provisions of the act of 1867; and from that time onward the rulings of the Treasury Department in relation to the duties levied on carpet wools were in accordance with this view of the law until the 21st of October last.

The first section of the act of March 2, 1867, provides: "That from and after the passage of this act, *in lieu* of the duties now imposed by law on the articles mentioned and embraced in this section, there shall be levied, collected, and paid on all unmanufactured wool, hair of the alpaca, goat, and other like animals, imported from foreign countries, the duties hereinafter provided."

It hardly needs authorities to sustain the proposition that

Duty on Carpet Wools.

when the provisions of an act are stated to be "*in lieu of the duties now imposed by law*," the new act repeals the former one. This language is very frequently used in the revenue statutes when the intention of Congress is to repeal the duties previously in force and to substitute new rates in their stead. (*Gossler vs. The Collector of Boston*, May term, 1867, before Justice Clifford and Judge Lowell; *Washington Mills vs. Thomas Russell*, United States circuit court for Massachusetts, Shepley, justice, October 21, 1875.)

After the passage of this act of March, 1867, until December, 1873, it is clear that the duty imposed by law upon carpet wools of the description under consideration was to be determined by a fair construction of the following words of that act, namely: "Upon wools of the third class, the value whereof at the last port or place whence exported into the United States, excluding charges in such port, shall be twelve cents or less per pound, the duty shall be three *cents per pound*. Upon wools of the same class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed twelve cents per pound, the duty shall be six cents per pound."

Under this statute the duty was to be levied upon the *value* of the wool at the last port of exportation, excluding charges in such port; and if that *value* was over 12 cents a pound, the duty was to be 6 cents per pound; if 12 cents or less per pound, then the duty was to be 3 cents per pound; and under this law it was not of the slightest consequence what it cost to get the wool to port. The question was its *value* at the port. If the *value* at the port was not over 12 cents per pound, excluding charges in such port, the duty could not be over 3 cents per pound.

Thus the law stood from 1867 until the Revised Statutes were passed, in 1873; and no law existed when the revisers commenced their compilation of the statutes which allowed any mode of levying duty upon these wools other than that named in the statute of 1867, which clearly and plainly was 3 cents per pound and no more upon the value of such wools in the port of exportation, exclusive of the port charges, provided their value was not above 12 cents per pound.

The statute of 1867, so far as it related to the duties on wools,

HAZING AT THE NAVAL ACADEMY.

was reproduced in schedule L, section 2504; and by the proviso under section 2908 it is enacted: "That this and the preceding section shall not be construed as impairing the provisions relating to duties on the several classes of imported wools, contained in section two thousand five hundred and four, under schedule L."

This and my former opinion, to which this is now added under the new suggestion from the Secretary, presents the full case relating to the duties upon these carpet wools, and would seem to render the question too clear for dispute, namely, that, under the law as it now stands, carpet wools of this description, whose *value* in the port of exportation, exclusive of the port charges, is not over 12 cents per pound, can be compelled to pay no higher rate of duty than 3 cents per pound.

Very respectfully, your obedient servant,
EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

HAZING AT THE NAVAL ACADEMY.

The act of June 23, 1874, chap. 453, to prevent hazing at the Naval Academy, was designed to cut off from a cadet found guilty of the offense, should the finding of the court-martial be approved by the superintendent, all chance of reinstatement or reappointment.

DEPARTMENT OF JUSTICE;
March 15, 1876.

SIR: In the case of Cadet-Midshipman Webb, dismissed for hazing, the Solicitor-General, on the 13th of January, 1876, gave an opinion which I approved. The opinion was that the pardon of the President would not reinstate a dismissed cadet. It was also his opinion that, after receiving an *unconditional pardon* from the President, such cadet might be reappointed by virtue of his complete restoration to all his rights through the effect of the pardon.

It is not necessary that I should now question the strictly legal soundness of the Solicitor-General's opinion. When that was issued I had not seen the statute under which the question arose. It is in these words:

Hazing at the Naval Academy.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases when it shall come to the knowledge of the superintendent of the Naval Academy at Annapolis that any cadet-midshipman or cadet-engineer has been guilty of the offense commonly known as hazing, it shall be the duty of said superintendent to order a court-martial, composed of not less than three commissioned officers, who shall minutely examine into all the facts and circumstances of the case and make a finding thereon; and any cadet-midshipman or cadet-engineer found guilty of said offense by said court shall, upon recommendation of said court, be dismissed; and such finding, when approved by said superintendent, shall be final, and the cadet so dismissed from said Naval Academy shall be forever ineligible to reappointment to said Naval Academy."

Approved June 23, 1874.

It is evident from the reading of this statute that the Congress intended to put an end to the disgraceful custom of hazing at the Naval Academy, and that Congress meant to cut off all chance of reinstatement or reappointment from a cadet who had been found guilty of the offense by a court-martial, if such finding should be approved by the superintendent.

It is not necessary to consider very carefully what the effect of a pardon by the President may be, or whether, after an unconditional pardon, a reappointment (the same as though the cadet had never been in the academy) is strictly legal or not.

I do not believe that the President would be justified in thus abrogating the clear intent and plain meaning of a salutary statute, and the Attorney-General wishes strongly to advise against any such course as will tend by indirection to nullify the statute.

Let the parties who consider themselves aggrieved apply to Congress for a change of the law; but I trust that the President will not interfere to relieve the party found guilty while the statute remains in force.

Very respectfully,

EDWARDS PIERREPONT.

Hon. GEORGE M. ROBESON,

Secretary of the Navy.

Per diem of Special Agents of Post-office Department.

PER DIEM OF SPECIAL AGENTS OF POST-OFFICE DEPARTMENT.

The provision in section 4017 Rev. Stat., for traveling and incidental expenses of special agents of the Post-Office Department, while it limits the allowance to each agent to "a sum not exceeding five dollars a day," does not entitle the agent to have that amount allowed him where he has agreed with the Department to take a less sum per day for such expenses.

DEPARTMENT OF JUSTICE,

March 20, 1876.

SIR: The law upon which you ask more full construction is this:

"SEC. 4017. The Postmaster-General may employ two special agents for the Pacific coast, and such number of other special agents as the good of the service and the safety of the mail may require. Such agents shall be entitled to a salary at the rate of not more than one thousand six hundred dollars a year each, and shall each be allowed for traveling and incidental expenses, while actually employed in the service, a sum not exceeding five dollars a day."

The salary is exactly fixed by the statute at \$1,600 a year, and, in addition to this salary, a "sum" not exceeding \$5 a day is allowed to each agent for traveling and incidental expenses while actually employed in the service. The maximum of the "sum" for such expenses is \$5 a day, but if the agent chooses to contract with the Postmaster-General to take 50 cents a day for traveling and incidental expenses, he can demand no more, though his traveling and incidental expenses may reach \$20 a day. The statute does not provide that his traveling and incidental expenses *shall be paid*. It only provides that "for" such expenses a "sum" not exceeding \$5 a day shall be *allowed*. The law does not provide that the "sum" shall be \$5 a day, but that it shall not be more than that. This sum can only be allowed to the agent on those days in which he is "actually employed in the service," but for those days the sum agreed upon for traveling and inci-

Case of Col. J. B. Kiddoo.

dental expenses, if \$5 or less, he is entitled to receive on the monthly settlement of his accounts.

I have the honor to remain, your obedient,
EDWARDS PIERREPONT.

Hon. MARSHALL JEWELL,
Postmaster-General.

CASE OF COL. J. B. KIDDOO.

The *proviso* in section 2 of the act of March 3, 1875, chap. 178, namely, "That no part of the foregoing act shall apply to those officers [*i. e.*, officers of the Army theretofore retired by reason of disability arising from wounds received in action] who * * * has an arm or leg permanently disabled by reason of resection, on account of wounds, &c., construed.

The word "resection" is a surgical term, signifying the removal by excision of dead or diseased bone—more especially the removal of such bone, in that way, from the articular extremities or the unconsolidated extremities of fractured bones.

In order to bring a case within the terms of so much of the *proviso* as is above quoted, the essential circumstances required are: (1) a previous wound, causing some portion of the bone to become diseased or dead; (2) thereby necessitating a cutting off and removal of the dead or diseased part, which is accomplished; (3) whereby the limb is permanently disabled.

It is sufficient if the disability is in part approximately attributable to the resection, though this be proportionately less than what is due to other contributory causes.

Where an officer was permanently disabled of a limb mainly from the effects of a wound received in battle, and a doubt exists whether part of the disability, at least, was not caused by a resection on account of the wound: *Held* that the officer is entitled to the benefit of the doubt, upon the ground that the law of 1875, operating as it does to take away rights previously granted by law, should not be made to affect those as to whom its application is doubtful.

DEPARTMENT OF JUSTICE,

March 22, 1876.

SIR: I return to your Department, herewith, the papers in the case of Col. J. B. Kiddoo, a retired Army officer. These papers were submitted to me by your predecessor in office under cover of a letter dated the 27th of January last, in which he stated that it was the desire of the President that I give an

Case of Col. J. B. Kiddoo.

opinion upon the case. I have now the honor to communicate to you my views thereon.

By section 32 of the act of July 28, 1866 (14 Stat., 337), officers of the Regular Army, entitled to be retired on account of disability occasioned by wounds received in battle, were authorized to be retired "upon the *full rank of the command* held by them, whether in the regular or volunteer service, at the time such wounds were received."

Under and in conformity with this provision, Colonel Kiddoo was retired, by reason of disability caused by wounds received in battle, upon the rank of brigadier-general; his actual rank being at the time that of colonel.

Subsequently (by section 2 of the act of March 3, 1875, 18 Stat., 512) it was enacted that all officers of the Army theretofore retired by reason of disability arising from wounds received in action should "be considered as retired upon the *actual rank* held by them, whether in the regular or volunteer service, *at the time when such wound was received*," and should be borne on the retired list and receive pay accordingly; and it was moreover expressly declared that this enactment should be taken and construed to include those then borne on the retired list who had been placed upon it on account of wounds received in action. The enactment, however, contains the following proviso: "*Provided*, That no part of the foregoing act shall apply to those officers who had been in service as commissioned officers twenty-five years at the date of their retirement; nor to those retired officers who had lost an arm or leg, or has an arm or leg permanently disabled by reason of resection, on account of wounds, or both eyes by reason of wounds received in battle;" (the remainder of the proviso is omitted, being deemed unimportant in this connection).

By an order of the War Department, dated March 23, 1875, purporting to be made conformably to the act of March 3, 1875, cited above, the retired list of the Army was "amended" to fix the rank of certain officers thereon (including Colonel Kiddoo) from March 3, 1875, as stated in the order, and thereby Colonel Kiddoo was reduced from the rank of brigadier-general to that of colonel on the retired list. He afterwards applied to be restored on that list to his former rank of brigadier-general, claiming that he was saved from the

Case of Col. J. B. Kiddoo.

operation of the act of March 3, 1875, by that part of the proviso above quoted which declares that the act shall not apply to a retired officer who "has an arm or leg permanently disabled by reason of resection on account of wounds" received in battle. His application for restoration, as I understand, is still pending in your Department, and that and the facts relating to his disability, in addition to the circumstances already mentioned, constitute the case above referred to.

The question involved therein appears to be, whether the disability of Colonel Kiddoo, as it existed at the date of the act last cited, comes within the meaning and intent of the clause in said proviso, viz, "an arm or leg permanently disabled by reason of resection, on account of wounds," &c.

In dealing with this question that officer should be regarded as if he were now in possession of the same rank on the retired list which he held at the date of that act, and as if the inquiry were whether the provisions of the latter, in so far as they *reduce* officers then on said list, apply to him. This is important in a practical point of view; for the effect of those provisions being to take away a right previously conferred by law, of which the officer was in full enjoyment when the act passed, he is entitled to the benefit of any doubt that may exist as to the applicability of such provisions to him.

The facts in relation to the disability of Colonel Kiddoo, as they appear by the papers submitted to me, amount to this: That he was wounded in battle, and thereby became permanently disabled of a leg; that two or more resections had been performed on the disabled limb prior to the act of 1875, on account of his wound; that after these operations the disability existed, and exists still, and is permanent; but there is a difference of opinion among physicians whether such disability did or did not result from the resection. Thus, upon this point, which is the only one whereon there appears to be any conflict, a board consisting of three medical officers of the Army, convened in May, 1875, to examine and report upon the disability of Colonel Kiddoo, makes the following statement: "After mature deliberation the board arrives at the conclusion that disability in this case does not result from loss of bone by resection, as is the case in long bones where a section of bone is removed in the line of continuity,

Case of Col. J. B. Kiddoo.

or the function of a joint is destroyed by resection of its articular surface." On the other hand, Surgeon J. H. Bill, of the Army, certifies, under date of April 13, 1875, that he has examined Colonel Kiddoo, and finds that "he has lost the use of his left thigh and leg in consequence of a resection instituted for the cure of a gunshot wound of the ilium, a wound received in action during the war of the rebellion." Again, under date of May 21, 1875, the same officer certifies that, having examined the person of Colonel Kiddoo, and being conversant with the circumstances relating to his case, in his opinion Colonel Kiddoo labors under permanent disability, in consequence of several resections undertaken for the cure of a fractured ilium, the result of a gunshot wound received in battle."

Perhaps this difference of opinion upon the point mentioned, making due allowance for the preponderance in point of numbers of those who take the negative view, may warrant the following conclusion: That the disability is in the main due (not to the resection, but) to other causes, the immediate effects of the wound; yet there is, nevertheless, a doubt whether it is not, in part at least, attributable to the resection; that is, to the loss of bone by that operation.

The word "resection" is a surgical term, and is understood to describe the removal by excision of dead or diseased bone, more especially the removal of such bone, in that way, from the articular extremities or the unconsolidated extremities of fractured bones; so that the clause in the proviso in question may be regarded as if it read, "an arm or leg permanently disabled by reason of the cutting off and removal of dead or diseased bone on account of wounds," &c. To bring a case within these terms, the essential circumstances seem to be: (1) a previous wound, causing some portion of the bone of the limb to become diseased or dead; (2) thereby necessitating a cutting off and removal of the dead or diseased part, which is accomplished; (3) whereby the limb is permanently disabled. With respect to the latter, the statute appears to contemplate a disability of the limb *proximately* resulting from the operation referred to. But it is not to be understood as requiring that the disability shall be due to that alone. The same wound may have so affected other parts of the

Case of Col. J. B. Kiddoo.

limb that, independently of the affection of the particular part operated upon, permanent disability would result from the affection of the former. In such case, if no part of the actual disability were proximately attributable to the resection, it would not come within the terms of the proviso; if, however, any part of the disability were thus attributable, even though quite small in proportion to what is due to other contributory causes, that would, I think, be enough. For, in the latter hypothesis, the absence of such other contributory causes might, indeed, greatly lessen the *degree* of the disability, but not entirely remove it, and the limb accordingly would still be in a state of disability from the remaining cause (the resection), though to a less extent. Whether of sufficient extent to entitle it to be regarded as "permanently disabled," within the meaning of the statute, could only be determined by an actual examination of the particular case, when no other contributory cause of disability is present; a condition that may never exist in the case under consideration.

Now, in the case under consideration, the first two circumstances above enumerated clearly appear. It is only as to the third that there is any difficulty. According to the conclusion of fact on that point, which I have already suggested, the disability of Colonel Kiddoo is mainly produced not by resection, but by other causes—the immediate effects of the wound—though there is a doubt whether it is not partly, at least, attributable to the resection. And agreeably to the foregoing views, if it is only partly attributable to the resection, that is sufficient to place it within the terms of the proviso.

Regarding Colonel Kiddoo, then, for present purposes, as still holding the same rank on the retired list which he held previous to the act of 1875, the case stands thus: A proviso in that act declares that it shall not be applicable to any one on the said list who has a limb "permanently disabled by reason of resection on account of wounds" received in battle. That officer is permanently disabled of a limb, mainly from the effects of a wound received in battle. But there is doubt whether a part of the disability, at least, is not "by reason of resection" on account of the wound; and the latter, if true, would be sufficient, under the proviso, to save him from the

Claim of John D. Sanborn.

operation of the act. Here, I think, the officer is entitled to the benefit of the doubt, upon the ground that the act, operating, as it does, to take away rights previously granted by law, should not be made to affect those as to whom its application is doubtful.

The conclusion to which the foregoing considerations bring me, in the light of the information contained in the papers submitted, is that the disability of Colonel Kiddoo, as it existed at the date of the act of 1875, comes within the clause in the proviso in that act above referred to.

I am, sir, with great respect, your obedient servant,
EDWARDS PIERREPONT.

Hon. ALPHONSO TAFT,

Secretary of War.

CLAIM OF JOHN D. SANBORN.

Under section 7 of the act of March 2, 1867, chap. 169, and section 39 of the act of June 6, 1872, chap. 315, also the appropriation act of March 3, 1875, chap. 129, John D. Sanborn is entitled to such sums only as the Commissioner of Internal Revenue (within the limit of the appropriation) has agreed to pay, and the payment whereof is approved by the Secretary of the Treasury, for services of the following description, viz: "For detecting and bringing to trial and punishment persons guilty of violating the internal revenue-laws, or conniving at the same, in cases where such expenses are not otherwise provided by law."

The independent action of each of those officers (the Commissioner and the Secretary) is necessary to warrant payment; neither can delegate to the other his powers.

DEPARTMENT OF JUSTICE,

March 27, 1876.

SIR: Yours of the 22d of December, 1875, asking for an expression of my opinion upon the question presented in a communication from the Commissioner of Internal Revenue, has received consideration, and the following is my opinion:

The question presented relates to the claim of John D. Sanborn, arising under the statute of March 2, 1867 (Rev. Stat., sec. 3463; 14 Stat., 473), section 7:

"*And be it further enacted*, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to pay such sums, not exceeding in

Claim of John D. Sanborn.

the aggregate the amount appropriated therefor, as may in his judgment be deemed necessary for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law. And for this purpose there is hereby appropriated one hundred thousand dollars, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated."

The latter part of section 39 of the act of June 6, 1872 (17 Stat., 257), is in these words : "And the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to pay such sums, not exceeding in the aggregate the amount appropriated therefor, as may, in his judgment, be deemed necessary for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law; and for this purpose there is hereby appropriated one hundred thousand dollars, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated."

The appropriation act of 1875 (18 Stat., 352,) reads as follows: "For detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, including payments for information and detection of such violations, one hundred thousand dollars."

The claim of Mr. Sanborn must rest upon these statutes, and the sums to be paid to him must be such, and such only, as the Commissioner of Internal Revenue (within the limit of the appropriation) agrees to pay, and which payment the Secretary of the Treasury approves ; and the services for which the payments can be made must be for services "for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law."

If Mr. Sanborn has performed these services at the request of the Commissioner of Internal Revenue, and the Commissioner has authorized such sums to be paid to him as are not

Resignation of Foreign Minister.

in excess of the appropriation, and the Secretary of the Treasury has approved the payment of such sums, then Mr. Sanborn is entitled to receive the same. The Commissioner cannot make the payment unless the Secretary of the Treasury approves the payment.

The statute provides that the sums paid shall be authorized by one officer of the Government and approved by another; the independent action of each is necessary before the "sums" can be paid. The Commissioner cannot delegate his powers to the Secretary nor can the Secretary delegate his to the Commissioner, any more than two judges can delegate their powers to a third judge, when the law requires that the judgment, to be binding, shall be the judgment of a majority of a court composed of three judges.

If Mr. Sanborn has performed for the Government the services contemplated by the statute above cited, he is entitled to the payment of "such sums" (not exceeding the appropriation) as the Commissioner authorizes and the Secretary of the Treasury approves.

The acts of the Commissioner and of the Secretary and the services performed by Mr. Sanborn are questions of fact, which do not come within the province of the Attorney-General to decide.

The law is as above stated.

I have the honor to remain, your very obedient, &c.
EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

RESIGNATION OF FOREIGN MINISTER.

In February, 1876, S., being then minister to England, tendered his resignation, to take effect on the arrival of his successor. A few days thereafter he asked for leave of absence to return to the United States, which was granted. Subsequently the Secretary of State addressed a letter to him at London, informing him of the acceptance of his resignation; but before this letter reached London he had left there for the United States. A nomination having been sent to the Senate in place of S., "resigned": *Held* that S. (being now in the United States) will cease to be minister on the confirmation and appointment of his successor.

Resignation of Foreign Minister.

DEPARTMENT OF JUSTICE,

April 12, 1876.

SIR: Yours, dated March 30, 1876, asking my opinion upon the present status of General Robert C. Schenck, has received my consideration, and I have the honor to reply.

I find from the papers submitted that the following are the facts:

On the 17th day of February last General Schenck tendered his resignation, stating the time at which it was to take effect in these words: "I propose that my resignation shall take effect on the arrival of my successor." Before this letter of resignation arrived, on the 21st day of February, General Schenck sent a cable telegram, asking leave of absence to repair to Washington, which leave was given on the 23d of February.

On the 2d of March General Schenck telegraphed, saying: "I tendered my resignation when the action of the Executive was questioned; as my own conduct is now the subject of charges, I assume the President's decision on my offer will be suspended while this proceeding is pending."

On the 3d of March the Secretary of State replied: "The President has taken steps to fill the place immediately; and, on that account, and for other reasons, cannot delay acting on resignation."

On the 6th of March the Secretary of State wrote a letter to General Schenck, in which are these words: "I am instructed by the President to state that your resignation is accepted." Before this letter reached London General Schenck was on his way to Washington.

On the 17th day of February the name of Mr. Dana was sent to the Senate as successor to General Schenck, the message stating that the nomination was in place of General Schenck, "*resigned*."

General Schenck left England under the leave of absence on the 4th day of March.

The Senate has not yet confirmed Mr. Dana.

The question is whether General Schenck is still minister. When the resignation of such an officer of the government

Mail Transportation by Railroads.

is tendered, and the time at which the resignation is to take effect is specifically named in the resignation, the acceptance of that resignation, without qualification, accepts the resignation with the condition attached.

If General Schenck had remained in England, he would have remained minister to England, under the facts presented, until his successor had arrived in England; but having subsequently obtained leave of absence to return to America, and having so returned, somewhat changed the condition of the acceptance of the resignation; and it is hardly reasonable to hold that it would be necessary for the new minister to arrive in England before General Schenck (now in the United States) should cease to be minister.

Under all the circumstances of the case as presented by the facts above stated, I am of opinion that General Schenck will cease to be minister on the nomination and confirmation of his successor.

Very respectfully, your obedient servant,
EDWARDS PIERREPONT.

Hon. HAMILTON FISH,
Secretary of State.

MAIL TRANSPORTATION BY RAILROADS.

Where two railroad corporations run from their point of junction to a common terminus (over the same track) separate trains with postal cars carrying the mails, and route-agents to accompany the same, each such corporation is entitled, under the act of March 3, 1873, chap. 231, to be paid at the rates thereby provided for the average weight of mails carried by it to the common terminus.

Railroad companies, carrying the mails under the arrangement and classification of the Postmaster-General, agreeably to the law as it existed prior to March 3, 1873, cannot now claim additional compensation. -

DEPARTMENT OF JUSTICE,
May 6, 1876.

SIR: The questions presented in yours of yesterday and of the day previous (both this day received), arising in the cases of the Rockford, Rock Island and Saint Louis Railroad Company, and of the Chicago, Burlington and Quincy Railroad Company, may be generalized thus: Where two railroad cor-

Mail Transportation by Railroads.

porations run from their point of junction to a common terminus (over the same track, which each is entitled thus to use) separate passenger-trains, carrying postal cars, agents, and mails, can the Postmaster-General, *since the passage of the act of March 3, 1873*, pay each company according to the weight carried by it, although the service of but one of them has been, by formal order to that effect, recognized by the department as extending over its entire length of road, while that of the other (so far as the distance between the junction and terminus aforesaid is concerned) has received no other recognition than the accrediting to its trains so run postal agents, who return registers of the mails carried over the whole extent of the line, their weights, &c., and no provision is made for any transfer or reception of the mails at said point of junction? Can the mail carriage of each corporation so performed be recognized as a distinct service under the act of June 6, 1872? If any other questions arise under earlier statutes or peculiar to either of these two cases, they will be subsequently and separately discussed. No contract in writing has been made with either company.

First. By the act of March 3, 1873, chap 231, sec. 1 (17 Stat., 558), the Postmaster General is "directed to readjust the compensation to be hereafter paid for the transportation of mails on railroad routes" upon the basis of the average weight of mails carried, with a specific increase for superior facilities provided in the way of longer postal cars, &c. The pay is to be measured at a fixed sum per mile per annum that the average weight is carried. Under this statute, the appointment of route agents to accompany the separate trains of each road over the entire railroad route to the common terminus, with directions *there* to distribute, receive, and deliver the mails, and to take, register, and return the weight of them, is a sufficient recognition of the service of the corporation to entitle it to be paid therefor at the rates provided by law for the average weight of mails carried to the common terminus.

Second. Under the law as it existed prior to March 3, 1873, it is believed that the corporations carrying the mails under the arrangement and classification of the Postmaster-General cannot now legally claim any additional compensation.

Las Animas Grant.

These answers cover the whole ground of the several interrogatories propounded.

Very respectfully, your obedient servant,
EDWARDS PIERREPONT.

Hon. MARSHALL JEWELL,
Postmaster-General.

LAS ANIMAS GRANT.

The action of the register and receiver of the proper land district, in passing upon claims of derivative claimants to lands theretofore claimed by Vigil and St. Vrain, under the provisions of the act of February 25, 1869, chap. 47, amendatory of the act of June 21, 1860, chap. 167, was final, and not subject to revision by the Land Department.

Col. William Craig, a derivative claimant under Vigil and St. Vrain, having established his claim "to the satisfaction" of the register and receiver of the proper land district, thereby became entitled to have furnished to him by the surveyor-general of Colorado, as evidence of title, an approved plat of the land which was awarded to him by the register and receiver aforesaid. In view of which: *Advised* that the President direct the Commissioner of the General Land Office to instruct the surveyor-general of Colorado to deliver to Colonel Craig an approved plat of the land so awarded.

In the exercise of his general administrative superintendence, the President may interfere to restrain an officer from assuming an authority that does not belong to him, as well as to compel the officer to perform a duty that does belong to him.

Hence it is competent to the President to entertain an appeal from the head of a Department which concerns the authority of a subordinate officer in the Department.

DEPARTMENT OF JUSTICE,
May 15, 1876.

SIR: The Attorney-General has the honor to present to the President his opinion upon the "Las Animas grant."

Col. William Craig applied to the President for an order directing that the surveyor-general of Colorado be ordered to issue a plat of his land included in the Las Animas grant, in accordance with the decision of the register and receiver-general of the Pueblo land district of that Territory.

The question, "Whether the Executive should take action upon the matter set forth in the letter of Colonel Craig to Hon. S. S. Burdett, Commissioner of the General Land Office,

LAS ANIMAS GRANT.

dated October 1, 1874, after the decision of the Secretary of the Interior in this case, and, if so, what action would be recommended," was referred by the President to the Attorney-General.

The facts as set forth in the letter of Colonel Craig are these:

Under the Mexican colonization act of 18th August, 1824, and the declaratory executive regulations on the 21st day of November, 1828 (1 Rockwell's Spanish and Mexican Law, 452, *et seq.*), Cornelio Vigil and Ceran St. Vrain, Mexican citizens, on December 8, 1843, presented their joint petition for a large grant of land to the Mexican authorities, and such action was had that, on the 2d of January, 1844, the petitioners were placed personally in "juridical possession" with the usual solemnities, and a certificate granted in due form, of a tract of land extending from the Arkansas River in front to the grant of Beaubien and Miranda in the rear, and from the valley of Las Animas or Purgatoire tributary below to within half a league of San Carlos tributary above. These boundaries include about eighty miles square and nine hundred and twenty-two square leagues. (The documents concerning these grants are found in Report No. 312, House of Representatives, Thirty-sixth Congress, First Session, pp. 269 to 278.)

On the 2d of February, 1848, the treaty of Guadalupe Hidalgo was entered into between the United States and Mexico, and proclaimed July 4 of the same year (9 Stat., p. 922), by which the region embracing this grant became the property of the United States. By the eighth article of that treaty it was provided that "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they may please."

If the grant was regular and perfect, then the property was inviolably protected in Vigil and St. Vrain by this treaty. (*United States vs. Moreno*, 1 Wallace, 400.) If it was incom-

Las Animas Grant.

plete, "it remained for the new government succeeding to the obligations of the former government to complete what thus remained imperfect." (*Beard vs. Federy*, 3 Wallace, 478, 490.)

Acting upon this principle, Congress, by an act of June 21, 1860, entitled "An act to confirm certain private land claims in the Territory of New Mexico," enacted "That the private land claims in the Territory of New Mexico * * *, designated as numbers one * * * seventeen, * * * be, and they are hereby, confirmed; provided that the claim number * * * seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants," being ninety-seven thousand six hundred and fifty acres in all.

Section 2 enacts "That in surveying the claims of said Cornelio Vigil and Ceran St. Vrain, the location shall be made as follows, namely: the survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle which have heretofore been given by said Vigil and St. Vrain in the tracts claimed by them; * * * and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section."

Section 4 enacts "That the foregoing confirmation shall only be construed as quietusclaims or relinquishments on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

It is obvious that, as Congress had provided no tribunal for determining what were the extent of the tracts occupied "by actual settlers holding possession under titles or promises to settle which had heretofore been given by Vigil and St. Vrain in the tracts claimed by them," this act became impossible of execution. To remedy this defect, and with the apparent intention to afford these settlers a method of adjusting their conflicting claims, Congress, on the 25th of February, 1869, passed an act entitled "An act to amend an act entitled 'An act to confirm certain private land claims in the Territory of New Mexico,'" (15 Stat., p. 275), which, among other things, provided "that the claims of all actual settlers upon the tracts heretofore claimed by the said Vigil

Las Animas Grant.

and St. Vrain holding possession under titles or promises to settle which have been made by Vigil and St. Vrain, or their legal representatives, prior to the passage of this act, who may establish their claims within one year from the passage of this act to the satisfaction of the register and receiver of the proper land district, shall in like manner be adjusted according to the subdivisional lines of survey so as to include the lands so settled upon or purchased, and the areas of the same shall be deducted and excluded from the adjusted limits of the claim of said Vigil and St. Vrain respectively.

By the third section it is enacted, "That upon the adjustment of the Vigil and St. Vrain claims, * * * it shall be the duty of the surveyor-general of the district to furnish proper approved plats to said claimants, or their legal representatives, and so in like manner to said derivative claimants, which shall be evidence of title."

By section 5 it is enacted, "That in case of the neglect or refusal of the said Vigil and St. Vrain, or either of them, to accept the provisions of this act and the act to which this is amendatory, * * * no suit shall be brought or proceedings instituted in any of the courts of the United States by such party, or by any one claiming through or under them, to establish or enforce said claims, or for any cause of action founded upon the same, after six months from the passage of this act."

It is not in controversy that the lands claimed by the "derivative claimants" would much exceed in extent an area of twenty-two square leagues, for which the grant was confirmed. It appears by a copy, duly certified by the Commissioner of the General Land Office, of the opinion of the register and receiver of the United States land office at Pueblo, Colorado Territory, under the provisions of the act of Congress approved February 25, 1869, that Craig made claim to one hundred and twenty-seven thousand acres of this land; that, "under his promise in the year 1855, St. Vrain selected a location for Craig, who actually settled upon the same in 1863 and began the settlement and cultivation of the place on which he resided and still resides, raising successive crops on the land and spending a very great sum of money in the improvement of said land, as testified to, not less than two

Las Animas Grant.

hundred thousand dollars; that he obtained several deeds from Vigil and St. Vrain, and those claiming title under them, during the years 1860 to 1864 inclusive, and that his title to the tract is clearly established: first, by one of the earliest promises of St. Vrain; second, by subsequent deeds thereto; and, third, by actual possession and cultivation by the claimant personally, and by tenants from 1863 to the present time; so that, subject to certain conveyances and claims of other claimants set forth in said opinion, "there are 73,288.2 acres of land to which we think William Craig is clearly entitled." This action and opinion of the register and receiver of the proper land district was duly filed in the General Land Office. It appears, further, that these proceedings and awards of the register and receiver of the land office were made known to the surveyor-general and "an approved plat" demanded of him, and that under date of the said 24th of March, 1874, and the 1st of April, 1874, the surveyor-general asked for instructions as to furnishing "approved plats" of the lands awarded to "derivative claimants" under Vigil and St. Vrain in Colorado, pursuant to the act of Congress of February 23, 1860. Meanwhile, on the 13th of March, 1874, the Commissioner wrote to the register and receiver to let the "derivative claimants" appeal to the Commissioner, and on the 14th of April following the Commissioner instructed the surveyor-general, by a letter of that date, to furnish no approved plats until the further decision of the Land Office, and on the 20th of April the rejected claimants notified the Commissioner that they claimed an appeal from the decision of the register and receiver; whereupon Colonel Craig addressed the letter referred by the President to the Attorney-General to the Commissioner of the General Land Office denying any such right of appeal, and asking that "an approved plat" might be furnished to him; and, failing to get such order from the Land Office or from the Secretary of the Interior, asked the interposition of the chief executive officer in his behalf.

The first question to be considered is, whether Colonel Craig is entitled to have furnished him by the surveyor-general of Colorado "an approved plat" of the land adjudged to him by the register and receiver of the proper land office un-

Las Animas Grant.

der the provisions of the act of February 25, 1869, as "evidence of his title."

It is stated in the decision of the Secretary of the Interior (p. 7) that "if the act of February 25, 1869, viewed in connection with the legislation of July 14, 1836, should lead my mind to the conclusion that it was the intention of Congress to convert the register and receiver into arbiters for the final adjustment of the rights of these derivative claimants, I should have no hesitation in saying that an appeal would not lie from their decision."

It is to be observed and kept in mind throughout the consideration of this question that the lands in controversy were never part of the public domain of the United States; they were never owned or sold by the government, but were the property of individuals, acquired under Mexican grants and acquiesced in by the United States in the treaty with Mexico and in the acts of Congress subsequently made. The act of 1836 (made long prior to the treaty), relating to the public lands, has no bearing upon this case.

The principles governing this question have been ably discussed and clearly defined during the present month of May (1876) by the Supreme Court of the United States in the opinion of Mr. Justice Davis in *Newhall vs. Sanger* (see 2 Otto, 761).

Congress, by the act of June 21, 1860, confirmed the title in the Mexican grantees. The act in express terms *relinquishes* all title of the United States to those lands.

The claimant's title comes of a Mexican grant. The United States has recognized that title and confirmed that grant, not made a new one. The effect of the word "relinquishment" upon lands granted to the citizen prior to cession of the region wherein situated by a treaty of the United States has been fully determined in *Les Bois vs. Bramell* (4 Howard, p. 449), the court holding that the word "relinquishment" in a confirmatory act of Congress, in case of private lands in territory ceded by treaty, the limits of which were undetermined by survey, vested in the private owner a *fee-simple*. Therefore this land never was a part of the public lands of the United States. The statute recognizing that condition of ownership decides that the location of the several claims

Las Animas Grant.

should be made on the earth's surface within certain limits, and for that purpose appointed the register and receiver of the land office a commission before whom the owners "should establish," within a time therein limited, "their claims to the satisfaction of the register and receiver," and not to the "satisfaction" of anybody else.

It will be further observed that the same act giving this power to the register and receiver made it a condition that the claimants should accept that tribunal or bring their cases into court and "establish their claims to their lands" within six months of the passage of the act.

This class of legislation giving to certain officers of the United States, with the consent of parties, certain *quasi* judicial functions, is nearly as old as the Government itself; and the question of such jurisdiction, and whether it is final, has been more than once decided by the Supreme Court, and has been many times the subject of discussion in the opinions of my predecessors in the office of Attorney-General, and especially have the words "establish to the satisfaction" of a given officer a right or claim been frequently construed, and in every instance, so far as I am advised, have been held to confer final jurisdiction over questions so submitted. (See *DeGroot vs. The United States*, 5 Wall., 420; case of *Atocha*, 17 Wall., 444.)

The question was submitted to the register and receiver of the land-office to determine, not as part of their duty as such officers, but as a kind of tribunal established by Congress for a special purpose. (See 11 Opinions, 47.)

In regard to the nature of the case before the President, Craig's counsel insist that it is not an appeal from the decision of the head of a Department, but an application to the Executive to require a subordinate officer to perform the duty imposed upon him by statute, and contend that this is a matter clearly within the power and duty of the Executive; while the opposing counsel urge that it is nothing but an appeal from the decision of the head of a Department, and maintain that such an appeal does not lie, in support of which position the following authorities are cited: 1 Opin., 624, 636, 678; 2 Opin., 481, 507; 4 Opin., 515; 5 Opin., 275,

, Las Animas Grant.

630; 6 Opin., 226; 10 Opin., 526, 527; 11 Opin., 14; 13 Opin., 28; 1 Lester's Land Laws, 680; 1 How., 290.

The first question is, whether the decision of the register and receiver under the act of 1869 can be revised by the Commissioner of the General Land Office. This is substantially the question which was submitted to and decided by the Secretary of the Interior; and the same question must necessarily be passed upon by the President, even if the case were what the counsel of Craig claim it to be, namely, an application to enforce the performance of official duty, before taking action on such application. Hence the case may be regarded as an appeal from a decision of the head of the Interior Department touching the authority of a subordinate officer in that Department; and the point now to be considered is, can the President entertain this appeal?

After much reflection, I am of opinion that the appeal is one which may be entertained by the President. It presents a question concerning the authority of a subordinate executive officer over a particular subject.

The President, in the exercise of his general administrative superintendence, may interfere to restrain an officer from assuming an authority that does not belong to him, as he unquestionably may to compel the officer to perform a duty that does belong to him. The functions of the President, viewed with reference to such superintendence, seem to me to include as well the power of requiring the various officers of the executive department of the Government to keep within the proper limits of their authority, as the power of requiring them to discharge the public trusts imposed upon them.

This view is not in conflict with the opinions of my predecessors in office to which I have been referred, nor indeed with the other authorities cited by counsel. On examination of the former, they are found to relate, one and all, to the subject of the power of revision by the President in *matters of official duty* which are specially committed to different Departmental officers, such as the settlement of public accounts (1 Opin., 624, 636, 678; 2 Opin., 481, 507, 508; 5 Opin., 630; 11 Opin., 14); or the allowance of pension claims (4 Opin., 518); or the determination of land cases (5 Opin., 275; 10 Opin.,

Las Animas Grant.

527); or the adjudication of patent cases (13 Opin., 28); or the decision of questions of fact in cases of contract with a Department (6 Opin., 226), or the determination of claims for services in a Department (10 Opin., 526). In none of these instances was the *jurisdiction* of the Departmental officer in any degree involved, but merely the *correctness of his official action in matters admitted to be within his competency*, so that they are clearly distinguishable from the case before me.

Recurring to the act of 1860, it will be seen that the confirmation of twenty-two square leagues in favor of Vigil and St. Vrain is not thereby definitely attached to any piece of land within the limits of the large tract originally claimed by them, but is left to be located within those limits according to the mode and directions therein prescribed. These look to the protection of the equitable rights of derivative claimants occupying lands within the same tract as against the confirmees, so far as to require the lands thus occupied to be surveyed and the area thereof deducted from the area confirmed before the residue, should any remain, be located.

The act of 1869 contains more specific provisions for ascertaining the claims of the derivative claimants to be deducted as aforesaid. These provisions authorize the deduction of the claims of *such of those claimants only* who may establish their claims within one year from the passage of the act (subsequently extended to one year from the completion and approval of the subdivisional surveys contemplated by the act) "to the satisfaction of the register and receiver of the proper land district."

The duty devolved upon the register and receiver is of a special and peculiar character. It forms, indeed, a part of the scheme devised for the location of the confirmed right upon, and the segregation of the quantity of land covered thereby from, the public domain; but it more immediately relates to matters in which the derivative claimants and the original claimants are alone interested. Those officers are to pass upon the claims of derivative claimants to the lands occupied by the latter which shall be presented within a stated period, and these claims manifestly do not come within the category of *private land claims against the Government*, being rather claims against the confirmees of a private land claim.

Las Animas Grant.

against the Government, which the latter has seen fit to protect in this way. In the proceedings before the officers on such claims the interests of the derivative claimants may be adverse to those of the original claimants. So, as has really proved to be the case, the derivative claimants may even be adversely interested therein as against each other. But the Government has no interest that can be affected thereby, and it can sustain no adverse relation to any of the parties thereto. The subject-matter of the proceedings is of purely private, individual concern, and the register and receiver exercise a judicial discretion therein. Such claims as shall be established to the "satisfaction" of those officers are contemplated by the statute to constitute a *location* of the previously unlocated confirmation to the extent of the claims so established, not exceeding in all, however, the quantity confirmed. Their action in the premises must be deemed to be final, unless an appeal therefrom is provided by statute.

There is nothing in the act devolving the duty referred to upon the register and receiver, which provides for a revision by the Commissioner of the General Land Office, or by any other officer, of their decisions upon the claims presented to them. But it is contended that at the time the above-mentioned appeals were taken the Commissioner derived authority to revise such decisions from the act of July 4, 1836, chap. 352, the first section of which declares, "That from and after the passage of this act the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States." And it is understood that the provision in this section specially relied upon as conferring the revisory authority is that respecting private land claims, which is in substance as follows: that the "executive duties" prescribed by law, relating to "private claims of land," shall be subject to the supervision and control of the Commissioner of the General Land Office.

Las Animas Grant.

Two questions here suggest themselves: 1. Do the claims, which the act of 1869 requires to be established to the satisfaction of the register and receiver, properly come under the description of "private claims of land" within the meaning of the said provision? 2. Is the duty imposed upon the register and receiver by that act an "executive duty" within the meaning of the same provision?

It is very manifest, from the context, that the words "private claims of land" were intended to signify only claims of that character which are preferred against the Government. It is obvious that the only parties who would be immediately interested in the proceedings before the register and receiver to establish their claims are the derivative claimants on the one hand and the original claimants on the other. The Government could have no interest one way or the other in the result—could not be admitted *as a party* to contest the claim sought to be established. Regarding the claims of the derivative claimants from this point of view, I do not think they come within the provision of the act of 1836, referred to above, which subjects to the supervision of the Commissioner of the General Land Office the performance of all executive duties relating to "private claims of land."

This seems to be a case in which the action of the President may be lawfully invoked. (*Barnard's Heirs vs. Ashley's Heirs*, 18 How., 43; also see 13 Wall., 82.)

I am of opinion that from the action of the register and receiver no appeal lies in this case to the Commissioner of the Land Office, and that the Secretary of the Interior has no jurisdiction under the act of July, 1836, to review the decision of said register and receiver in this case. It is not suggested that the decision of the register and receiver was fraudulent or corrupt.

I therefore recommend that the President direct the Commissioner of the General Land Office to instruct the surveyor-general of Colorado to deliver to Colonel Craig an approved plat of the land adjudged to him by the decision of the register and receiver of the Pueblo land district in that Territory, dated February 23, 1874.

I have the honor to remain, your obedient servant,
EDWARDS PIERREPONT.

The PRESIDENT.

Duty on Wool.

DUTY ON WOOL.

The phrase, "charges in such port," occurring in schedule L, of section 2504, Rev. Stat., does not include export duty. (*Contra*, opinion of October 23, 1876, on re-examination of the subject.)

DEPARTMENT OF JUSTICE,

May 18, 1876.

SIR: The question upon which, by yours of the 12th instant, my opinion is asked, and to which I have now the honor to reply, is this:

Is an export duty upon wool levied in a foreign country at the last port or place of shipment for the United States to be deemed a local or port charge within the meaning of the provisions of schedule L of the revised tariff, relating to the mode of fixing the value of foreign wools for the purpose of determining the rate of duty thereon?

It is provided in section 2907 of the Revised Statutes that, "In determining the dutiable value of merchandise, there shall be added to the cost, or to the actual wholesale price or general market-value at the time of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, * * * export duty," &c.

It is provided by the following section (2908) that "All additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise. * * * But nothing contained in this and the preceding section shall apply to long combing or carpet wools costing 12 cents or less per pound, unless the charges so added shall carry the cost above 12 cents per pound, in which case, 1 cent per pound duty shall be added: *Provided*, That this and the preceding section shall not be construed as impairing the provisions relating to duties on the several classes of imported wools, contained in section 2504, under schedule L."

I think it plain that "export duty" is not "port charge," as contemplated by the statute, and the phrase "excluding charges in such port" in schedule L does not mean "export

Expenses of Direct-tax Commissioners.

duty"; and it seems clear that—since by section 2908, which specifically mentions "carpet wools," and substantially provides that if the charges (of which *export duty* forms a part) carry the cost above 12 cents per pound 1 cent per pound duty shall be added, it was intended that *export duty* should be added to the cost in order to determine the "*dutiable value*"—if by adding such export duty to the value at the last port whence imported into the United States the price of carpet wools was thus raised above 12 cents per pound, 1 cent per pound duty should be added.

Hence I regard the circular of the Secretary of the Treasury of March 25, 1876, to the collector of the port at Boston, as in harmony with this and my previous opinion upon the general subject of duty upon carpet wools.

Very respectfully,

EDWARDS PIERREPONT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

EXPENSES OF DIRECT-TAX COMMISSIONERS.

The *proviso* in section 6 of the act of March 3, 1835, chap. 87, requiring bills for expenses incident to proceedings of the direct-tax commissioners to be submitted to and approved by the Secretary of the Treasury before payment, does not withhold from the action of the Secretary cases in which his approval is asked after such bills have been paid by the commissioners.

The authority exercised by the Secretary under section 14 of the same act, in fixing the rates of compensation to be allowed the clerks, &c., there mentioned, is distinct from that exercisable under section 6, and does not amount to an *approval* of payments to such persons within the meaning of the latter section.

DEPARTMENT OF JUSTICE,
May 27, 1876.

SIR: Yours of the 26th instant, referring to sections 6 and 14 of the direct-tax act of March 3, 1835 (13 Stats., 501), states the following case:

Expenses of Direct-tax Commissioners.

"It appears that a number of accounts for clerk hire and other expenses presented to different boards of tax commissioners were paid by the boards prior to any approval by the Secretary of the Treasury, and were not approved by any Secretary during the existence of the boards. In consequence the members of the boards are held liable on their official bonds for the amounts so expended.

"In this state of facts, some of the parties interested have made application to the present Secretary of the Treasury to approve the accounts in question, and I have, therefore, to ask your opinion on the following questions:

"1. Can the present Secretary of the Treasury legally pass upon and approve or reject accounts for the expenses referred to in section 6 of the act above cited?

"2. Is the fixing by the Secretary of the Treasury of the rates of compensation to be allowed to the clerks, surveyors, and assistants, mentioned in section 14, *an approval* of payments to such persons, within the meaning of the language used in section 6?"

To the former of the above questions I respectfully submit an answer in the affirmative; to the latter, in the negative.

It seems to me that the proviso in section 6, above referred to, viz: "That the bills of such expenses shall be *first* submitted to and approved by the Secretary of the Treasury" does not withhold from his jurisdiction cases in which *approval* is asked *after* the commissioners have paid such *expenses*, although by such delay the latter may have incurred a charge of official irregularity. What the United States stipulates for is the advantage of an exercise of the Secretary's judgment as to the propriety of the expenditures before these are allowed. Nothing occurs or has been suggested to me to show that the United States do not enjoy that advantage in all cases where items for *expenses* are rejected until approved. In the meantime the failure of the commissioners to comply with the directions of the statute as to the time of application is a circumstance that may affect the Secretary's discretion. I do not think that it affects his jurisdiction, and am of the opinion that such jurisdiction continues in each succeeding Secretary so long as the accounts are unsettled.

I add that the provision (section 14) requiring the Secre-

Mileage for Marshals.

tary of the Treasury to prescribe the compensation of the clerks, &c., whom the commissioners may employ, is a distinct function from that in the sixth section, considered above, which includes other questions incident to the accounts of salaried officers; such as, whether the claimant was in office during the time specified, &c.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

MILEAGE FOR MARSHALS.

Under the act of February 22, 1875, chap. 95, only *one* charge for mileage is allowable for the service of several writs in hand at the same time, requiring the marshal to travel to the same place or in the same direction. (*Contra*, see NOTE, p. 109.)

DEPARTMENT OF JUSTICE,

May 29, 1876.

SIR: Yours of the 24th instant, addressed to the Attorney-General, contains the following question of law:

Whether a marshal of the United States is entitled to full mileage on each writ served by him, when several, issued in behalf of the Government to be served on different persons, are or might be served at the same time, only one travel being necessary to make the service on all of said persons.

I have read the letter of the Comptroller, inclosed by you, and considered the cases therein stated, in one of which a marshal "charges as for five separate trips of 125 miles each to serve five subpœnas on witnesses for the United States in five cases of indictments, all the writs having been issued February 2, 1876, and all served from the 9th to the 11th February, in Edmonson County, at or near the same place;" and in another of which another marshal "charges travel on each of ten warrants issued by a commissioner at Clarkesville, on the 16th October, 1875, all served the next day by one deputy, nine of the writs being served twenty-five miles from Clarkesville, and the tenth thirty miles from that place. It appears that for one travel ten mileages are claimed."

Mileage for Marshals.

Allowances for mileage to marshals, attorneys, and clerks are now regulated by the act of 22d February, 1875 (18 Stats., 334), quoted by the Comptroller. This act provides that "no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law."

Under this act, in my opinion, there can be but one charge for mileage upon several writs (subpœnas, &c.) in hand at the same time, requiring a marshal to travel to the same place or in the same direction.

If a marshal have in hand several writs (subpœnas, &c.) against the same person or different persons living at A, he will charge mileage but once. If he have several writs, &c., against different persons living at either A, B, or C, which are (say) in the same direction, he will charge one mileage only to A, one mileage from A to B, and one mileage from B to C.

No matter how many precepts a marshal may have in his hands requiring him to go to the same place or in the same direction, he makes but one *actual and necessary travel* in serving them; for instance, in the second case above the marshal made one *actual* and nine *constructive* travels. The act of 1875 puts an end to the notion that the latter are performances for which the marshal is to be compensated.

With great respect, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE TREASURY.

NOTE.—The question considered in the foregoing opinion was re-examined by Attorney-General Devens, in an opinion given to the Secretary of the Treasury, under date of October 10, 1878, in which a different view is expressed. The conclusion arrived at by Judge Devens is, that a marshal "is entitled to full mileage on each writ served by him, when several issued in behalf of the Government to be served on different persons are or might be served at the same time, only one travel being necessary to make the service on all of said persons, where such travel is actually performed."

Superintendent of the Military Academy.

SUPERINTENDENT OF THE MILITARY ACADEMY.

An officer of the Army, holding the rank of a major-general, may be assigned to the place of superintendent of the Military Academy. Sections 1310 and 1314 of the Revised Statutes, in so far as they apply to the selection of a superintendent of the Military Academy, considered and construed.

DEPARTMENT OF JUSTICE,

May 29, 1876.

SIR: Your communication of the 11th ultimo directs my attention to sections 1310 and 1314 of the Revised Statutes, and submits the question whether a major-general in the Army can be legally assigned to the place of superintendent of the Military Academy at West Point.

I have examined those sections, and am of the opinion that they do not present any legal impediment to the assignment of an officer of that rank to that place.

Section 1310 but reproduces a provision contained in the act of June 12, 1858, chap. 156, which was in force at the time of the adoption of the Revised Statutes, and which reads thus: "That the superintendent of the Military Academy, while serving as such by appointment of the President, shall have the local rank, the pay, and allowances of a colonel of engineers."

When this provision was enacted, engineer officers were alone eligible to the superintendency of the Military Academy under the law by which the latter was established, and the highest grade then existing in the Engineer Corps was that of colonel. Originally the chief officer of the corps was superintendent of the academy, and was stationed at West Point, but he having in the course of time become a bureau officer of the War Department, with his station at Washington, a subordinate officer of the corps (usually a major or captain) was thenceforth ordinarily selected for superintendent of the institution, whilst the chief was charged with its *inspection*. The above provision left the field for the selection of a superintendent just as it previously was, namely, limited to the Corps of Engineers; but it aimed to enhance the dignity of the position, so as to make it more nearly correspond with the impor-

Superintendent of the Military Academy.

tance of the place, by annexing thereto the highest rank then existing in that corps, together with the pay and allowances thereof; in doing which, it was manifestly far from the design to *thereby* at the same time place restrictions upon the exercise of the power of selection. This had been already restricted in the manner above stated. However, the restriction here referred to, which was the only one imposed, was subsequently removed by Congress, as will hereinafter be shown.

With respect to section 1314, only its first clause need be considered. That clause is taken from section 6 of the act of July 13, 1866, chap. 176, which I give here entire: "That the superintendent of the United States Military Academy may hereafter be selected, and the officers on duty at that institution detailed, from any arm of the service, and the supervision and charge of the academy shall be in the War Department, under such officer or officers as the Secretary of War may assign to that duty." It will be observed that the last clause of this enactment is substantially reproduced in section 1331 of the Revised Statutes, the first clause being embodied in said section 1314.

The provisions of the act of 1866, just quoted, were mainly designed to remove the restrictions theretofore existing relative to the selection or assignment of officers for the administration and management of the affairs of the academy. Previously, as has already been stated, the superintendency of the institution pertained exclusively to the Corps of Engineers. That act changed this, and enabled the President to select for that place from among other officers of the Army than those belonging to the Corps of Engineers.

But the point is suggested, in view of the words of the act, "from any arm of the service," whether it at the same time did not fix a limit as to the rank of the officer who might be thus selected for the place. If the term "arm," as there used, be taken to signify only some one of the various organizations of the *line* of the Army, as cavalry, infantry, or artillery, then, indeed, would the field of selection seem to be confined to either or any one of those organizations, in none of which is there a higher grade established than that of colonel; and this grade would, perhaps, as a consequence, be the maximum

Superintendent of the Military Academy.

limit, as to rank, to which the power of selection could go. Yet if it is taken in that sense, not only would other branches of the military service, which are not of the line, seem to be necessarily excluded, but also the Corps of Engineers, which does not constitute an "arm" of the service according to that signification of the term; a result clearly not contemplated by Congress. I incline to the view that the phraseology under consideration was not meant to embrace any particular branches of the military service to the exclusion of others, but that it was meant to comprehend all departments of the Army; the purpose being to make available for the selection of a suitable person for the management of the academy the entire active list of the Army, having regard, of course, to the requirements of other fields of duty. In this respect the Military Academy was placed in much the same situation as that then and now occupied by the Naval School, where all officers of the Navy, from a commander up, are eligible to the superintendency of the institution, and where that position has at different times been filled by a commander, captain, commodore, rear-admiral, and vice-admiral.

Thus, as I conceive, there is nothing in the two sections referred to, viz, sections 1310 and 1314 of the Revised Statutes, which forbids the assignment of an Army officer holding the rank of a major-general to the place of superintendent of the Military Academy.

I am, sir, very respectfully, your obedient servant,
EDWARDS PIERREPONT.

Hon. ALPHONZO TAFT,
Secretary of War.

OPINIONS
OF
HON. ALPHONSO TAFT, OF OHIO.
* APPOINTED MAY 22, 1876.

"CARRIAGES" UNDER THE CUSTOMS LAWS.

Carriages, previously in use by the owner, are not "personal effects" within the meaning of section 2505 Rev. Stat., and are not entitled to exemption from duty by force of that section.

DEPARTMENT OF JUSTICE,
June 2, 1876.

SIR: In response to yours of the 15th of May concerning the propriety of admitting carriages previously in use by the owner without payment of duty, under Rev. Stat., 493, section 2505, exempting "wearing apparel in actual use, and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade," &c., I would respectfully say, that while the term "personal effects," standing alone, would obviously include carriages, yet upon the well-recognized principle of construction that general words are restrained, when accompanied by specific terms, to items that are *ejusdem generis* with the enumerated articles, it does not appear to be the intent to exempt carriages by this clause, but only such things (watches, rings, jewelry, &c.) as are worn, like apparel, upon the person, or are used in connection therewith, like brushes, &c.

No change in your regulation of December 4, 1874, is therefore recommended.

Very respectfully, your obedient servant,
ALPHONSO TAFT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

* NOTE.—The commission of Judge Taft, as Attorney-General, is dated May 22, 1876. But he did not enter upon the duties of the office until June 1, 1876, up to which time his predecessor, Judge Pierrepont, remained in office.

Shipping.—Citizenship—Passports.

SHIPPING.

Rebate of duties, under section 2513 Rev. Stat., applies only to vessels designed to be documented for and employed in foreign trade, or in trade between the Atlantic and Pacific ports of the United States.

**DEPARTMENT OF JUSTICE,
June 2, 1876.**

SIR: In response to the inquiry contained in yours of the 26th of April, I would respectfully say that only vessels designed to be documented for and employed in trade between this country and that of some foreign nation, or between the Atlantic and Pacific ports of the United States, are entitled to the rebate of duties upon the articles enumerated in Rev. Stat., section 2513, entering into their construction.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

CITIZENSHIP—PASSPORTS.

A Spanish subject by birth was naturalized in the United States in February, 1876, and thereupon his son, aged twenty, who was born in the island of Cuba, applied to the State Department for a passport, stating that he had resided in the United States for five years, but that it was his intention to reside in the country of his nativity and engage in business there: *Held* that the son, being a minor at the time of the naturalization of his father, must be considered a citizen of the United States within the meaning of section 2172 Rev. Stat., and that no ground exists for withholding the issue of a passport to him on the score of nationality. *Held*, further, that the circumstance that he intends to return to and reside in the country of his birth does not make him less entitled to a passport than if his intended destination were elsewhere.

The laws of the United States authorize the issue of passports to all citizens thereof, without distinction, whether native born or naturalized. Accordingly, when a naturalized citizen applies for a passport, though with a view to traveling or residing in the country of his former nationality, his right to have the passport issued to him is just as obligatory upon the State Department as if he were a native-born citizen intending to go to the same country.

Citizenship—Passports.

DEPARTMENT OF JUSTICE,

June 7, 1876.

SIR: Your communication of the 29th of March last, addressed to my predecessor in office, presents for the consideration of the Attorney-General the following case and question:

"Upon February 16, 1876, Francisco Cordova, born a subject of Spain, was naturalized in the United States district court for the southern district of Florida, at Key West. An application dated on the same day is forwarded to the [State] Department by the son of the above person, producing a copy of the record, stating that he was born at Havana, in the island of Cuba, on the 16th of October, 1855, and that his age is twenty years; and a passport is claimed as the minor son of a naturalized citizen, the applicant making the usual declarations and taking the oath of allegiance. Upon February 25 information was requested as to the residence of the applicant during the past five years, and whether it was his purpose to retain his residence in this country, or to resume a residence in the Spanish Dominions and engage in business there. Under date of March 13 the applicant replied, by affidavits, to the effect that he had been residing in the State of Florida during the last five years, and that it was his purpose to resume his residence in Spanish Dominions and engage in business there.

"You will therefore perceive that a Spanish subject having become naturalized on the 16th day of February, 1876, on the same day his child of the age of twenty years five months and over, who intends immediately to return to Spanish Dominions, take up his residence, and engage in business, makes application for a passport as the minor child of a naturalized citizen; and I have to request your opinion whether, under these circumstances, this minor child is entitled to a passport, and must be considered a citizen of the United States through the naturalization of his father, and within the meaning of section 2172 of the Revised Statutes."

The section here named provides that "the children of persons who have been duly naturalized under any law of the United States, * * * being under the age of twenty-one years at the time of the naturalization of their parents, shall,

CITIZENSHIP—Passports.

if dwelling in the United States, be considered as citizens thereof." This provision is merely a re-enactment of a like provision contained in section 4 of the act of April 14, 1802, chap. 28, which was in force at the time of the adoption of the Revised Statutes; and hence the interpretation that has been given by eminent authority to the somewhat ambiguous expression, "children of *persons* duly naturalized," used in that act, according to which interpretation the naturalization of the *father* only would be sufficient in any case (see 2 Kent's Com., 12th ed., pp. 52, 53, and also 6 Cranch, 183), becomes equally applicable to the same expression in the provision above quoted. But all doubt as to the sufficiency of the naturalization of the father to confer citizenship upon the resident minor children was removed by operation of the act of February 10, 1855, chap. 71, the second section whereof conferred the privileges of citizenship upon women married to citizens of the United States, if they were of the class of persons for whose naturalization the previous acts of Congress provided; and this, whether the citizenship of the husband existed at the passage of the act or subsequently, or before or after the marriage (see Kelly *vs.* Owen, 7 Wall., 496). This section was in force when the Revised Statutes were adopted, and its provisions are substantially re-enacted in section 1994 of the latter.

Accordingly, in the case before me, by the naturalization of the father the right of American citizenship may well be regarded as having been conferred, in virtue of the said section 2172, upon his son, who, it appears, was in his minority at the time of such naturalization, and was then, and had for some five years previously been, and, as I infer, still is, residing or dwelling in the United States.

Viewing the applicant in this case, then, as entitled to be considered a citizen of the United States, there would seem to be no ground for withholding the issue of a passport to him on the score of nationality. And with respect to the circumstance that he contemplates taking up a residence and engaging in business within the dominions of Spain, of which country he was, before he acquired American nationality, a citizen by birth, this does not, in my opinion, make him any the less entitled to a passport than if his intended destination were elsewhere.

Storage Fees.

A passport such as he has applied for is merely a certificate of citizenship and of identity; its purpose being to enable the bearer to be admitted within the territory of a foreign government in the quality of, and with the privileges thereby allowed to, a foreign citizen. Our laws prohibit the issue of passports of this sort to any other persons than citizens of the United States; but they authorize their issue to all citizens, without distinction, whether native born or naturalized; and where a naturalized citizen applies for a passport with a view to traveling or residing abroad, though his intended destination may be in the country of his former nationality, his right to have the passport issued to him is just as obligatory upon the Department of the Government charged with this matter as if he were a native-born citizen intending to go to the same country.

I am, by the foregoing considerations, led to the conclusion that the question submitted by you should be answered in the affirmative, and I so answer it.

I have the honor to be, very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. HAMILTON FISH,
Secretary of State.

STORAGE FEES.

In ascertaining the storage fund out of which the customs officer is entitled to retain the maximum allowed, under section 5 of the act of March 3, 1841, chap. 35 (section 2647 Rev. Stat.), all storage fees received are to be computed, including those which have accrued from storage of merchandise in buildings owned by the Government.

DEPARTMENT OF JUSTICE,

June 12, 1876.

SIR: Yours of last Saturday, 10th instant, concerning claim of S. M. Breckinridge, former surveyor of port of Saint Louis, has received the immediate attention requested.

It requires a construction to be given to the act of March 3, 1841 (chap. 35, sec. 5, 5 Stats., 432), in force during his term of office, and embraced in Revised Statutes, section 2647. The question is whether or not, as surveyor, Mr. Breckinridge

Storage Fees.

is entitled to retain \$2,000 out of the sums collected for storage of goods in a building erected and owned by the United States, to wit, in the basement of the custom-house, under the clause authorizing this deduction to be made out of moneys received "for rent and storage of goods, wares, or merchandise which may be stored in the public storehouses, *and for which a rent is paid, beyond the rents paid by the collector or other such officer.*" (5 Stats., 432, sec. 5.)

The doubt suggested is whether or not the fees for storing dutiable merchandise in buildings for which, by reason of national ownership, no rent *eo nomine* is paid, can be withheld to make up the maximum compensation of a collector "or other such officer."

The only issue directly presented in Donovan's case was the amount of compensation, as is apparent from an inspection of the record transmitted by you and with the other inclosures herewith returned. It was declared to be \$5,000 instead of \$6,000, but there was no indication that any part of it was to be derived from fees for the storage of goods in the custom-house. Still, the language of the opinion, referring to storage as a source of revenue, when compared with that of the cited case (United States *vs.* McDonald, 5 Wal., 657-658), indicates that all storage fees, whether accruing from buildings owned or leased by the Government or from those known as private bonded warehouses, are to be computed in ascertaining the fund from which the customs officer is entitled to obtain his maximum, provided their sum total (less rents paid) equals that maximum. The ambiguity which has occasioned the reference of the matter to this Department arises from the use of the word "*paid*," in the lines above quoted from the statute (*i. e.*, "for rent of goods, &c., which may be stored in the public storehouses, and for which a rent is *paid*," &c.), instead of the word "*received*." The obvious meaning is that from all storage fees *received* by the United States the rent paid for the warehouses (if any) was to be deducted; and to the balance, not exceeding \$2,000, the customs officer was entitled.

The conclusion is, then, that, although not distinctly so ruled in Donovan's case, Mr. Breckinridge and others similarly situated would be justified in claiming the *net profits* of

Appeals in Customs Cases.

all storage including that in Federal buildings up to the maximum compensation allowed them by law; or, to be more accurate, it is right that *all* such storage should be entered among the items of the account of fees from which that maximum can be retained.

Very respectfully, your obedient servant,
ALPHONSO TAFT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

APPEALS IN CUSTOMS CASES.

An appeal to the Secretary of the Treasury, taken under section 2931 or 2932 Rev. Stat., is determined, when the Secretary, having arrived at a conclusion either favorable or adverse to the appellant, makes known his decision to the official in his Department charged with the matter of the appeal.

The Secretary is not bound to give notice of his decision to the appellant; the latter must inform himself thereof at his peril.

Suit may be instituted by appellant without having first obtained a decision from the Secretary, if decision on his appeal is not made within the times specified in said sections.

The ninety days within which suit must be brought begin to run from the date of the decision where the duties are paid before the decision, and from the date of payment where the duties are paid after the decision.

Powers of the Secretary, under sections 3012 $\frac{1}{2}$ and 3013 Rev. Stat., with reference to refunding for overpayment of duties, explained.

DEPARTMENT OF JUSTICE,
June 13, 1876.

SIR: Upon the facts of the case of George W. Bond & Co., as given in yours of the 26th of April, legal questions arise applicable to the course of the administration of the Treasury Department and to the cases of importers who have appealed to that Department, upon which an opinion is requested. They will be stated and answered in the order in which they were proposed by you.

1. "When is an appeal taken, under Rev. Stat., section 2931 or 2932, to be regarded as *decided*? What action is necessary to give full force and effect to the decision of any such appeal?"

Appeals in Customs Cases.

Answer. The appeal is decided whenever the Secretary of the Treasury reaches, and indicates to the person in his Department charged with that business, a conclusion either favorable or adverse to the appellant. No further action is necessary to give effect to the decision. It is like the decision of any other tribunal, to the records of which suitors must resort, at their peril, to learn the proceedings in and disposition of their cause.

2. "Is it incumbent upon the Department to notify the appellant of such decision? If so, in what manner and by what means? Or, is it incumbent upon the appellant to seek such information as may be necessary for the preservation of his rights?"

Answer. As stated in the conclusion of the first answer, no notice need be given, but the appellant must inform himself at his peril. It has been authoritatively determined (in Westray's case, 18 Wall., 330) that the collector is *not* bound to give any notice of his liquidation to the importer. Although the circumstances under which the collector and the Secretary of the Treasury render their decisions differ in some respects, yet the ruling of the Supreme Court of the United States as to notice by the collector bears strongly upon the question of notice by the Secretary. As the court there observe, to require notice would be to add to the statute a condition the legislators did not place there.

3. "Can the importer bring suit at the expiration of the terms mentioned in those sections without obtaining a decision from the Secretary if none has then been made?"

Answer. He can. The apparent meaning of the law is that, if the decision is not made within the time specified, suit may be instituted without having first obtained it.

4. "When do the ninety days within which suit may be brought commence to run?"

Answer. From the day the Secretary makes his decision, or that on which the duties are paid, whichever is last. If the duties are paid *before* the decision, it dates from the decision; if not paid until after the decision, it dates from the payment.

5. "To what extent has the Secretary of the Treasury dis-

Refund of Customs Duties.

cretion, under Rev. Stat., section 3013, to waive any of the requirements of sections 2931, 2932?"

6. "What are the powers of the Secretary under sections 3012½ and 3013?"

Answer. The purport of section 3012½ simply is, that where the money has been paid prior to the decision and the appeal is *sustained*, the Secretary of the Treasury shall draw his warrant in favor of the importer for the sum thus found to be in excess of the requirements of law.

The next section (3013) allows the Secretary, when *satisfied* that non-compliance with the requirements as above stated was owing to circumstances beyond the control of the importer, &c., to draw his warrant for so much of the duty as he finds to have been paid in excess of that established by law. Strictly speaking, he is to "waive" no provision; but when "satisfied" by evidence of the existence of a certain state of facts, *i. e.*, that the failure to appeal or commence suit was owing to circumstances which the importer could not control (like sickness, necessary absence, &c.), he may make the proper abatement and draw his warrant for the same. It does not apply to any mistake of law, nor to any omissions to inform himself (owing to a mistaken view of the law) of the result of his appeal.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

REFUND OF CUSTOMS DUTIES.

Opinions of May 27 and July 6, 1874 (14 Opin., 653, 672), touching the meaning and effect of the twentieth section of the act of June 30, 1864, chap. 171, reaffirmed.

Section 21 of the act of June 22, 1874, chap. 391, is intended to limit the time within which errors in the liquidation and payment of duties may be corrected. It has no application to claims under the provisions of section 20 of said act of June 30, 1864, for refund of additional duties exacted and paid upon importations made on the 29th and 30th of April, 1864.

Refund of Customs Duties.

DEPARTMENT OF JUSTICE,
June 15, 1876.

SIR: I have considered the case of Mr. Joseph Loyzance for refund of duties, which was submitted to the department in your communication of the 24th of April last.

It appears by your statement that the duties were exacted on certain goods "*imported at New York on the 29th of April, 1864,*" under the joint resolution of that date, imposing an additional duty of 50 per cent. on all goods imported above the duties then chargeable thereon, the resolution being regarded at the time as taking effect on the day of its passage.

Subsequently, however, Congress declared, in section 20 of the act of June 30, 1864, chap. 171, that the resolution "shall not be deemed to have taken effect until after the 30th day of April, 1864," and also provided that "any duties which shall have been exacted and received contrary to the provisions" of that section "shall be refunded by the Secretary of the Treasury." And I understand that Mr. Loyzance claims, under the section just cited, a refund of the additional duty exacted as aforesaid and paid by him.

It furthermore appears by your communication that a certified statement for refund of the duties in this case was received at the Treasury Department from the collector at New York in April, 1874, but that it was not approved by your predecessor in office, and also that in January last "an application was made for refund of these duties, which was denied on the ground that no authority of law existed for such refund, and application is now made for reconsideration of such action."

In connection with this case, you refer me to two opinions from this Department (dated respectively May 27 and July 6, 1874, see 14 Opin., 653, 672); and after directing my attention to the twenty-first section of the act of June 22, 1864 (18 Stat., 186), you ask whether under the above circumstances the claim is barred or in any manner affected by that section?

Looking at this claim independently of the last-mentioned section, I entertain not the least doubt that it is within the provision contained in the act of June 30, 1864, directing the Secretary of the Treasury to refund. If, as is stated, the

Refund of Customs Duties.

goods on which the additional duty was exacted and paid by the claimant were *imported* on the 29th of April, 1864, the day of the passage of the joint resolution imposing such duty, I am unable to conceive any case to which that provision would more clearly apply. The opinions of my predecessor, to which you refer, are to the effect (1) that the twentieth section of the act of June 30, 1864, postponed the effect of the joint resolution of April 29, 1864, until after the 30th of April, 1864; (2) that the provision contained in that section authorizing the Secretary to refund is limited to cases in which the additional duty has been exacted and received on importations made upon the 29th and 30th of April, 1864; (3) that the provision for refunding is imperative upon the Secretary.

From these opinions, in the correctness of which I concur, it follows that the claimant in this case had a right to a refund of the 50 per cent. additional duties which had been paid by him on the 29th April, 1864, unless his claim has been barred by the twenty-first section of the act of June 22, 1874, which is as follows, viz:

"That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the date of entry, in the absence of fraud, and in absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon his part."

This act is intended to limit the time in which errors in the liquidation and payment of duties could be corrected. But the claimant's right in this case does not arise from any error or mistake or from any fraud, but from an express provision of the statute that the money which had been paid by him on the goods imported on the 29th April, 1864, should be refunded to him. The act of June 22, 1874, therefore, has no application to it, nor am I aware of any statute of limitations which does apply to it.

My opinion is that the claim of Mr. Loyzance is not "barred,

Contracts for Army and Navy Supplies.

or in any manner affected," by section 21 of the act of June 22, 1874.

I have the honor to be, very respectfully,
ALPHONSO TAFT.

Hon. B. H. BRISTOW,
Secretary of the Treasury.

CONTRACTS FOR ARMY AND NAVY SUPPLIES.

The exception contained in section 3732 Rev. Stat. in favor of contracts or purchases in the War and Navy Departments for clothing, subsistence, forage, fuel, &c., withdraws such contracts or purchases from the operation of the prohibition in section 3679 Rev. Stat.

Held, accordingly, that contracts and purchases in those Departments for clothing, subsistence, &c., may be made, though there is no appropriation adequate to their fulfillment, provided such contracts and purchases do not exceed the necessities of the current year.

DEPARTMENT OF JUSTICE,
June 19, 1876.

SIR: I have examined the following question proposed by the Commissary-General of Subsistence in a letter addressed to the Secretary War, dated the 12th instant, and by you submitted to me, with a request for an official opinion thereon, viz: "Can the Subsistence Department contract for or purchase subsistence for the Army (not in excess of the necessities of a current fiscal year) when there is no appropriation adequate to the fulfillment of the contract or purchase?"

This question appears to have arisen upon sections 3679 and 3722 of the Revised Statutes, which, for convenience, I will here quote entire, underscoring the parts of each to which, as I understand, the inquiry particularly relates:

"SEC. 3679. *No Department of the Government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations.*"

"SEC. 3732. No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, *except in the War and Navy Departments, for clothing, subsistence,*

"Carriages" under the Customs Laws.

forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

These two sections, which formerly existed under different acts of Congress, have been incorporated into the same general act by the revision of 1874. They are to be read together as one law; and the plain implication from the exception contained in section 3732, in favor of contracts and purchases on behalf of the United States in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, and transportation, must be construed as applying to the general prohibition in 3679 as well as to the more special prohibition contained in 3732. Taking the two sections together, it is clear to my mind that contracts and purchases in the War and Navy Departments for clothing, subsistence, &c., may be made though there is no appropriation adequate to the fulfillment of the contract or purchase, *provided* such contracts and purchases do not exceed the necessities of the current year.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. J. D. CAMERON,
Secretary of War.

"CARRIAGES" UNDER THE CUSTOMS LAWS.

Carriages are not "household effects" within the meaning of the paragraph in section 2505 Revised Statutes, which reads, "Books, household effects, or libraries, or parts of libraries, in use of persons," &c., and exemption from duty cannot be claimed for them thereunder.

DEPARTMENT OF JUSTICE,

June 30, 1876.

SIR: The letter of the Acting Secretary, of 23d instant, requesting a construction of the clause of the act imposing duties upon imports which exempts "Books, household effects, or libraries, or parts of libraries, in use of persons or families from foreign countries, if used abroad by them, not less than one year, and not intended for any other person or persons, nor for sale," has received careful consideration. The inquiry is whether or not carriages so used abroad and intended for personal use here come within this exemption.

Refund of Customs Duties.

Early and repeated decisions in England have held that books, wines, horses, &c., do not pass under bequests of "household goods and effects." The express mention of "books" and omission of other articles so determined not to be included under the general term "household effects" indicates that carriages are not within the exemption.

Very respectfully, yours,

ALPHONSO TAFT.

Hon. SECRETARY OF THE TREASURY.

REFUND OF CUSTOMS DUTIES.

Section 1 of the act of March 3, 1875, chap. 136, instead of conferring new powers upon the Secretary of the Treasury, *restricts* those already possessed under sections 3012^{1/2} and 3013 Revised Statutes. But cases in which the Secretary has made no ruling or decision are not within its operation.

Importers, before being concluded, are entitled to a ruling of the Secretary, if they have taken the proper steps to obtain it; which ruling, after it is made, can only be declared erroneous in law, as to duties actually paid under it, by the judgment of a court.

Section 2 of said act authorizes the Secretary, with the concurrence of the Attorney-General, to modify adversely to the United States any construction of the tariff previously adopted; but no refund can be made by him of duties which have been collected under such construction, except in pursuance of a judicial decision.

DEPARTMENT OF JUSTICE,

July 1, 1876.

SIR: Two letters have been received from the Treasury Department, one dated the 7th and the other the 19th ultimo, relating to the construction of the act of March 3, 1875, chap. 136, (18 Stats., 469), "restricting the refunding of customs duties," &c., the first letter inquiring as to the meaning of the second section of that act, and the subsequent one as to the first section.

Taking these statutory provisions in the order of their arrangement, I will first examine the first section of the act to which my attention is directed, in order to determine whether or not it "confers any new powers upon the Secretary of the Treasury," and whether or not it relates to cases in which he "has made no specific decision," "and, if so, to what cases."

Refund of Customs Duties.

It is the last proviso of this section that leads to the propounding of these inquiries by you.

Excepting in cases of withdrawals for exportation and of goods injured by casualties, the previously existing powers of the Secretary in making refund are given in Revised Statutes, sections 3012½ and 3013, with reference to which an opinion has recently been given at your request. The act of June 22, 1874, chap. 391, sec. 21, (18 Stats., 190), limited to one year, in the absence of fraud, the time in which errors could be corrected. The above-named sections of the Revised Statutes seem to authorize the rectification of mistakes of law, or the granting of a refund upon a construction of the tariff differing from that under which the duties were exacted; and it was to prevent this that the first section of the act of March 3, 1875, chap. 136, was framed. It substantially enacts that moneys collected for duties shall not be refunded by reason of any supposed error of *law*, unless that error has been ascertained by the final judicial determination of a competent tribunal; but allows the correction of errors of *fact* within one year from their discovery, provided the collector is within ten days of such discovery notified of the error, if in favor of the Government.

It would seem, then, that so far from conferring any *new* powers upon the Secretary, this section *restricts* those already possessed, as the title of the act indicates, to errors of fact, instead of including both those of law and fact, as was done by the sections referred to in the Revised Statutes. It excludes from its application entirely, however, *all* those cases in which the Secretary has made *no* ruling or decision. Before they are concluded, importers are entitled to a ruling of the Secretary, *provided* they have taken the steps (by protest and appeal) required to obtain it. After such ruling has been made, it can only be declared erroneous in *law*, as to duties actually paid under it, by the judgment of a court.

The second section, to which the letter of the 19th ultimo refers, permits the Secretary to modify, in accordance with the opinion of the Attorney-General, adversely to the United States, any construction of the tariff previously adopted; but authorizes no refund of any duties collected under the orig-

Transportation of Merchandise in Bond.

inal construction. To authorize such refund, a judicial determination as to the true purport of the law is a *sine qua non*.

The importers to whom you refer, having paid the duties upon the wool under the original construction given by the Secretary to the tariff, must first establish their right to a remission by a decision of a competent court before any refund can, under existing laws, be made by the Secretary of the Treasury.

Very respectfully,

ALPHONSO TAFT.

The SECRETARY OF THE TREASURY.

TRANSPORTATION OF MERCHANTISE IN BOND.

Section 2994 Rev. Stat. has no application to the transportation of *appraised* merchandise. The word "merchandise," at the commencement thereof, is limited in its signification to such merchandise as may, under the four next preceding sections (2990 to 2993 inclusive), be entered for immediate transportation to the port of final destination, without appraisement and liquidation of duties at the port of original importation.

Under section 2939, Rev. Stat., the Secretary of the Treasury can make no regulations other than those which may be deemed expedient and necessary for the due execution of such parts of the revenue laws as relate to warehouses.

But the provisions of section 251 Rev. Stat. comprehend the making of rules and regulations for the transportation of appraised merchandise in bond from one collection district to another, and they invest the Secretary with authority over that subject as ample as that which he formerly derived under the fifth section of the act of August 6, 1846, chap. 84, and the ninth section of the act of March 28, 1854, chap. 30.

DEPARTMENT OF JUSTICE,
July 1, 1876.

SIR: On the 25th of February last the late Secretary of the Treasury, Mr. Bristow, addressed a letter to my predecessor in office, requesting an official opinion upon the question whether section 2994 of the Revised Statutes applies to the transportation of *appraised* merchandise. That letter, I find, was left unanswered by my predecessor, and the consideration of the question submitted has accordingly devolved upon me.

Transportation of Merchandise in Bond.

Section 2994 provides that "*Merchandise transported under the provisions of this title* shall be conveyed in cars, vessels, or vehicles, securely fastened with locks or seals, under the exclusive control of the officers of the customs," &c. Some of the sections of the title referred to, *e. g.*, the four next preceding (I might also add, the four next following) section 2994, contain provisions which exclusively relate to the transportation of unappraised merchandise in bond; while others of the same title, as sections 3000 and 3001, provide for the transportation of appraised dutiable merchandise in bond. And the inquiry involved appears to be whether the language of section 2994, quoted above, was meant to include merchandise of the latter as well as of the former description.

Taken literally, and entirely disconnected from the context, the words "*merchandise transported under the provisions of this title*" are doubtless susceptible of being applied to any merchandise, appraised or unappraised, the transportation whereof is authorized by any section of such title. But after careful examination of the subject I incline to the view that they were not intended to have an application so general—that they, indeed, refer only to the peculiar description of merchandise to which the four sections immediately preceding relate.

Sections 3000 and 3001 of the Revised Statutes embody, substantially, the provisions of the act of March 28, 1854, chap. 30, theretofore in force, which relate to the withdrawal of imported merchandise from a bonded warehouse in one collection district to be transported in bond to a bonded warehouse in another collection district, for the purpose of rewarehousing the same thereat. Here the merchandise, in order to be withdrawn and transported, must have previously been duly entered for warehousing, appraised, and the duties chargeable thereon ascertained. But during a prescribed period it may be withdrawn under bond from warehouse in *any* district, for transportation to *any other* district, without regard to the circumstance whether the place of withdrawal was or was not the place of original importation or of original entry for warehousing.

On the other hand, sections 2990 to 2993, inclusive, embody in substance a part of the provisions of the act of July

Transportation of Merchandise in Bond.

14, 1870, chap. 255, and its supplements, which relate to the transportation of imported merchandise, before any appraisement thereof and ascertainment of the duties chargeable thereon are had, from the port of original importation to the port of final destination, *i. e.*, the port to which the merchandise appears by the invoice or bill of lading and by the manifest to be consigned and destined. A distinctive feature of these provisions is that the merchandise, to be transportable thereunder, must have been imported at certain enumerated ports, and must appear also to be consigned to and designed for certain enumerated ports. The ports *from* which the merchandise may be transported are alluded to as ports of "arrival," or "first arrival," or "original importation;" and those *to* which the merchandise may be transported as ports of "destination" or "final destination."

Now, it will be observed that the second clause of section 2994 provides that "*such* merchandise"—that is to say, the merchandise spoken of in the first clause of the same section—"shall not be unladen or transshipped between *the ports of first arrival and final destination*," &c. Unquestionably the ports here meant are those which are referred to by the same designation in sections 2990, 2991, 2992, and 2993, immediately preceding. So that, from the language of the second clause, it would seem that the merchandise contemplated by the first clause is merchandise with respect to which provision is made in those sections for transportation (not from a bonded warehouse in one collection district to a bonded warehouse in another collection district, as in sections 3,000 and 3001, but) from the port of "first arrival" to the port of "final destination." This view is strengthened by the consideration that if the first clause were taken in so broad a sense as to include appraised merchandise transportable under sections 3000 and 3001, the effect of the second clause would be to impose restrictions in regard to the unlading and transshipment of such merchandise while *en route*, where it happened to be transported from a warehouse at the place of original importation, which would not by the terms of the statute be imposed where it happened to be transported from a warehouse at any other place; and clearly it could not have been the design to make a discrimination of that sort.

Transportation of Merchandise in Bond.

Thus the word "merchandise," at the commencement of section 2994, should, I think, be regarded as limited in its signification to such merchandise as may under the four next preceding sections be entered for immediate transportation without appraisement and liquidation of duties at the port of original importation.

I am accordingly of the opinion that that section has no application to the transportation of appraised merchandise.

After the foregoing had been prepared, I received a letter from Mr. C. F. Conant, as Acting Secretary of the Treasury, dated the 28th ultimo, in which reference is made to the question submitted by the Secretary of the Treasury on the 25th of February last, and in which I am requested, should that question be answered by me in the negative, to give an opinion upon an additional question hereinafter stated. Having answered the former question in the negative, I will now, in compliance with that request, consider the additional question.

My attention being first directed to the fifth section of the act of August 6, 1846, chap. 84, to the ninth section of the act of March 28, 1854, chap. 30, and to section 2989 of the Revised Statutes, the question is asked: "Whether the Revised Statutes in any way impair, limit, or restrict the general powers conferred on the Secretary of the Treasury by the respective acts of 1846 and 1854, especially the latter, and, if so, to what extent?"

This question, as I understand it, relates to the authority with which the Secretary of the Treasury was invested, previous to the adoption of the Revised Statutes, by virtue of the fifth section of the act of 1846 and the ninth section of the act of 1854, to make regulations respecting the transportation of appraised merchandise in bond; and the point is, whether such authority has been continued in the Secretary by the Revised Statutes without modification.

The fifth section of the act of 1846 authorized the Secretary "to make, from time to time, such regulations, not inconsistent with the laws of the United States, as may be necessary to give full effect to the provisions of this act and secure a just accountability under the same."

Transportation of Merchandise in Bond.

By the ninth section of the act of 1854 the Secretary was "authorized from time to time to establish such rules and regulations, not inconsistent with the laws of the United States, for the due execution of this act, as he may deem to be expedient and necessary."

Both of these acts came under the general description of laws pertaining to the raising of revenue from imports, and contained provisions specially relating to particular branches of that subject : as, for instance, to bonded warehouses, to the withdrawal of goods therefrom, for transportation in bond to another port of entry or to another collection district, &c. And from the sections above mentioned the Secretary had derived power, which he had also exercised, to make regulations, not inconsistent with the laws of Congress, respecting the transportation of appraised merchandise under the provisions of those acts.

On examining section 2989 of the Revised Statutes, to which I have been referred, I think that under the provisions of that section the Secretary cannot make any regulations other than what may be deemed by him expedient and necessary for the due execution of such parts of the revenue laws as relate to warehouses.

Turning, however, to section 251 of the Revised Statutes, I find that it contains a provision which, after eliminating so much of the phraseology of the section as seems to be unimportant in this connection, reads as follows :

"The Secretary of the Treasury * * * shall prescribe * * * rules and regulations, not inconsistent with law, to be used * * * in carrying out the provisions of law relating to raising the revenue from imports, or to duties on imports, or to warehousing."

The language of this provision is sufficiently comprehensive to include the making of rules and regulations for the transportation of appraised merchandise in bond from one collection district to another, and it confers upon the Secretary a discretionary authority thereunto quite as ample as he formerly derived under the acts of 1846 and 1854.

In my opinion, then, the Revised Statutes have not in any way impaired, limited, or restricted the authority of the Secretary granted by those acts, to make regulations concerning

Sanborn Contract.

the transportation of appraised merchandise, but such authority remains under the Revised Statutes just as broad as it previously was.

I have the honor to be, very respectfully,

ALPHONSO TAFT.

Hon. J. D. CAMERON,

Acting Secretary of the Treasury.

SANBORN CONTRACT.

Upon examination of section 7, act of March 2, 1867, chap. 169 (sec. 3463 Rev. Stat.); act of July 20, 1868, chap. 176; act of March 3, 1869, chap. 121; act of April 10, 1869, chap. 15; act of July 12, 1870, chap. 251; act of March 3, 1871, chap. 113; sec. 1, act of May 8, 1872, chap. 140 (sec. 256 Rev. Stat.); sec. 39, act of June 6, 1872, chap. 315; sec. 1, act of March 3, 1873, chap. 226; sec. 1, act of June 19, 1874, chap. 328; and sec. 1, act of March 3, 1875, chap. 129: Held that the offer of "a reward for taxes recovered by reason of information furnished by the claimant," contained in Treasury Circulars No. 99, No. 99 revised, and No. 99 second revision, was authorized by law.

But no rate of compensation for information furnished being established by those circulars, the rate fixed by the Commissioner of Internal Revenue must in each separate case have the approval of the Secretary of the Treasury in order to warrant payment.

DEPARTMENT OF JUSTICE,

July 5, 1876.

SIR: In your letter of April 4, 1876, you propose for the consideration of this Department these questions:

"1st. Did the provisions of the statutes cited in my letter, and also in the opinion of the Attorney-General, confer authority upon the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make the offers of reward contained in Circulars No. 99, No. 99 revised, and No. 99 second revision, herein inclosed; i. e., was the authority given by statute exceeded by including within the terms of these offers a reward for *taxes* recovered by reason of information furnished by the claimant.

"2d. If the terms of said offers did not exceed the authority given by the statutes, had the Commissioner of Internal Revenue authority to bind the Treasury Department by a supplementary parol agreement to pay Mr. Sanborn the

Banborn Contract.

maximum of 10 per centum for such information, &c., as he might give under the offers contained in said circulars!"

The statutory provisions to which attention is invited, stated chronologically, are these:

Act of March 2, 1867, chap. 169, section 7: "*And be it further enacted*, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to pay such sums, not exceeding in the aggregate the amount appropriated therefor, as may in his judgment be deemed necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law. And for this purpose there is hereby appropriated one hundred thousand dollars, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated." (See Rev. Stats., sec. 3463.)

The appropriation acts of the four succeeding years contained appropriations for the same purpose in this language: "For detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where the expenses are not otherwise provided for by law, one hundred thousand dollars." (See acts of July 20, 1868, chap. 176, and of March 3, 1869, chap. 121, 15 Stats., 99 and 299; acts of April 10, 1869, chap. 15; of July 12, 1870, chap. 251, and of March 3, 1871, chap. 113, found in the 16 Stats., 9, 239, and 483.)

The act of May 8, 1872, chap. 140, sec. 1 (17 Stats., 68, 69), reads thus: "For detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law, eighty thousand dollars. And from and after the passage of this act the *Secretary of the Treasury* shall have power to employ not more than three persons to assist the proper officers of the Government in discovering and collecting any money belonging to the United States, whenever the same shall be withheld by any person or corporation, upon such terms and conditions as *he* shall deem best for the interests of the United States; but no compensation shall be paid to such persons, except out of the

Sanborn Contract.

money and property so secured ; and no person shall be employed under the provisions of this clause who shall not have set forth in a written statement, under oath, addressed to the Secretary of the Treasury, the character of the claim out of which he proposes to recover or assist in recovering moneys for the United States, the laws by the violation of which the same have been withheld, and the name of the person, firm, or corporation having thus withheld such moneys ; and if any person so employed shall receive, or attempt to receive, any money or other consideration from any person, firm, or corporation alleged thus to have withheld money from the United States, except in pursuance of the written contract made in relation thereto with the Secretary of the Treasury, such person shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one thousand dollars or imprisoned not less than two years, or both, in the discretion of any court of the United States having jurisdiction ; and the person so employed shall be required to make report of his proceedings under such contract at any time when required to do so by the Secretary of the Treasury."

This provision is incorporated into the Revised Statutes, section 256.

The act of June 6, 1872, chapter 15, section 39 (17 Statutes, 256, 257), is this :

"SEC. 39. That so much of section one hundred and seventy-nine of the act of July thirteenth, eighteen hundred and sixty-six, as provides for moieties to informers, be, and the same is hereby, repealed ; and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to pay such sums, not exceeding in the aggregate the amount appropriated therefor, as may, in his judgment, be deemed necessary for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law ; and for this purpose there is hereby appropriated one hundred thousand dollars, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated."

The act of March 3, 1873, chapter 226, section 1 (17 Statutes, 494), contains this clause :

Banborn Contract.

"For detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, including payments for information and detection of such violations, one hundred thousand dollars."

The revision of the laws (Rev. Stat., sec. 3463) contains substantially the language of the first-cited act of March 2, 1867, chapter 169, section 7, to wit:

"SEC. 3463. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law."

The appropriation act of June 19, 1874, chap. 328, sec. 1, and of March 3, 1875, chap. 129, sec. 1 (18 Stats., 93 and 352,) employ language identical with that above quoted from the act of March 3, 1873.

The statutes referred to, as appears by a comparison of the language of the acts of 1872, 1873, 1874, and 1875, making appropriations to pay these expenses or rewards, do authorize the offers contained in the several circulars, No. 99, 99 revised, and 99 second revision, of "a reward for taxes recovered by reason of information furnished by the claimant." It is the duty, under the laws, of persons and corporations liable to taxation to make returns containing the statements of the facts and figures which are to be the basis of the assessment. A failure to do this is a "violation" of the internal-revenue laws. To expose this omission of duty is a detection of such violation. It may be added that, though different degrees of moral delinquency may exist, the effect upon the revenues of the United States is precisely the same, whether a tax legally payable is tacitly withheld or is evaded by active frauds. Consequently, these cases come within the spirit of the law as well as within the letter.

The correct answer to the second inquiry is less obvious.

The provisions of the before cited act of May 8, 1872, embodied in Rev. Stat., sec. 256, contemplate the employment by the Secretary of the Treasury of persons to discover and

Sanborn Contract.

collect moneys withheld from the Government, which would include taxes, but impose limitations or conditions precedent upon his exercise of that power. One of the conditions of the contracts so made is that payment can be had from no other source than from the moneys thus discovered and collected, and it is evident that the persons contracted with are authorized to make the collections from which they are to be paid. No appropriation, then, would be necessary to provide for the payment of these parties.

Mr. Sanborn made no such contract, had no such authority, and did not attempt to collect of delinquents himself. He simply gave the Treasury Department information of violations of the internal-revenue laws by the non-payment of taxes. The appropriation laws of 1873 and later years contemplate the furnishing of such information, and provide funds to compensate the informers. In the disbursement of these funds by the Commissioner of Internal Revenue, payments of compensation are to be made by the Commissioner of Internal Revenue, "with the approval of the Secretary of the Treasury." If these circulars established a rate of compensation, then it might possibly be held that payments made for such information, according to such established rate, were made with the approval of the Secretary of the Treasury, who had approved the circulars. But these circulars did not establish a rate of compensation; they merely established a limit, and within that limit left the rate of compensation to the discretion of the Commissioner. In other words, the Secretary of the Treasury delegated the power of fixing the rate of compensation to the Commissioner, and the claimant insists that the approval of these circulars was a legal approval of the rates afterwards fixed by the discretion of the Commissioner. On this point I agree with the opinion expressed by my predecessor, Judge Pierrepont, in an opinion of this Department, dated March 27, 1876, that the approval of the Secretary of the Treasury must be of the payment itself, and not merely of a circular which authorizes the Commissioner to fix the compensation. The statute does not contemplate any delegation of discretion in the matter of compensation. So far, then, as these circulars can be construed to authorize the Commissioner to make any supplementary

Duty of Attorney-General.

verbal contract fixing the rate of compensation, it is not binding on the Government. But the rate of compensation must have the approval in each instance of the Secretary of the Treasury, and with that approval the Commissioner may make the payments for information furnished in pursuance of the circular.

Respectfully,

ALPHONSO TAFT.

The SECRETARY OF THE TREASURY.

DUTY OF ATTORNEY-GENERAL.

The Attorney-General is not authorized to give an official opinion in response to a call from the head of a Department, though the call is made at the request of a committee of Congress, where the question proposed does not arise in the administration of such Department.

DEPARTMENT OF JUSTICE,

July 7, 1876.

SIR: Yours of the 29th ultimo has been duly considered and herewith I submit a reply.

The opinion therein required refers to a fee claimed by Vann and Adair from the Osage Indians, and this claim has already been disallowed, and is no longer before you officially.

The only case in which an opinion by the Attorney-General, when given upon a requisition by the head of another Department, can have official significance, is where it concerns *a question of law arising in the administration of such Department.* (Rev. Stat., sec. 356.)

Here, I observe that the claim made by Vann and Adair has already been administered by you, and that, consequently, no question remains.

I presume that your note is not due to any inadvertence as regards the above familiar rule, inasmuch as you inclose a resolution of the Committee on Indian Affairs, requesting you to obtain such opinion, by way, perhaps, of suggesting that such resolution may afford a special justification for your requisition.

It seems probable that the committee understood that in pressing the resolution they were only requesting you to put in motion the *ordinary machinery* by which opinions are ob-

Settlement of Accounts at the Treasury.

tained from the Attorney-General. As Congress has not thought proper to empower its committees to require such opinions directly (1 Opin., 365; 5 Opin., 561), no doubt the Committee on Indian Affairs did not suppose that the above resolution authorized you to make any application otherwise unauthorized.

I do not apprehend that you will take this reply to be inconsistent with an earnest wish to do all that I may to aid you, or the Committee on Indian Affairs, in the discharge of your several official duties. It is a mere repetition of what my predecessors have often declared, viz: that the Attorney-General has no warrant to act outside of the statutes which define his office.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

The SECRETARY OF THE INTERIOR.

SETTLEMENT OF ACCOUNTS AT THE TREASURY.

Sections 273 and 277 Rev. Stat. considered with reference to the relative duties of the Second Comptroller and the Auditor in the settlement of accounts; and held that every account falling within the scope of the latter section must undergo, successively, an examination by the Auditor and an examination by the Comptroller—that the action of the Auditor is primary altogether, and not definitive; while the action of the Comptroller is wholly revisory, and final.

The word "settled," as used in section 273, is equivalent in meaning to "finally acted upon."

Where the Comptroller, on revision, does not concur in the action of the Auditor disallowing an account, but finds and admits a balance arising thereon; or where he disagrees with the Auditor in allowing an account, and rejects it; or increases or diminishes the balance reported by the Auditor in such account,—in any of these cases the account is *by the action of the Comptroller* finally adjusted, and further action by the Auditor is not required.

The purpose of section 191 Rev. Stat. is to declare the effect of the settlement of an account by the accounting officers of the Treasury as regards the executive branch of the Government, not to define or explain the duties of those officers relative to the settlement itself; and the provisions thereof comprehend all balances arising upon settlement of accounts, which it becomes the duty of the Comptroller to certify to the heads of Departments.

Settlement of Accounts at the Treasury.

Accordingly, where an account against the Government is disallowed by the Auditor, who in consequence reports no balance due thereon, but transmits the account with his action to the Comptroller for revision, and the latter officer, upon examination, finds and admits a balance due the claimant: *Held* (assuming the action of the Auditor and of the Comptroller to appear in due form) that nothing more remains to be done by either officer to complete the settlement of the account, but that the Comptroller should certify the balance which he finds and admits, accompanying his certificate with evidence of the action of the Auditor in the same matter.

Where the Comptroller's certificate is unaccompanied by the Auditor's action, or does not affirmatively (by recital or otherwise) show that the account has been acted upon by the latter, the head of Department to whom the balance is certified should withhold his requisition for payment until satisfactory evidence on that point is produced.

The action of the Auditor need not be incorporated in the certificate of the Comptroller, nor form part of the same document.

DEPARTMENT OF JUSTICE,
August 2, 1876.

SIR: The following questions, which were submitted by your Department to my predecessor in office on the 27th of May last for his official opinion thereon, having been left unanswered on his retirement from this Department, their consideration has devolved upon me.

"1. When the Auditor (Second or Third) refuses to state an account or claim which legally pertains to the business of his office, and on appeal or otherwise the Second Comptroller considers there is a balance on the same which should be stated for payment, what formal proceeding should be pursued by either or by both of them to reach a proper settlement of the account or claim in question?

"2. When payment through requisition is demanded on a certificate which *prima facie* shows that a balance on a *claim* is found due and is stated by the Comptroller *alone*, and which wholly ignores the Auditor who must book the claim on its payment, should the Secretary of War, without further knowledge of the case, issue his requisition to pay the balance thus stated?

"3. If the Secretary of War should return the above-mentioned certificate to the Comptroller and 'submit' any *facts* affecting the correctness of such balance, and the Comptroller should thereupon return the certificate reaffirming his decis-

Settlement of Accounts at the Treasury.

ion, should the Secretary of War issue his requisition to pay the amount?

"4. Under the circumstances last above mentioned, would any points of law, such as that 'balances' have not been stated by the Auditor, or that nothing is produced to show that 'the Third Auditor' has received and examined the claim or account for 'loss of horses and equipments,' justify the Secretary of War if he would withhold his requisition rather than honor the certificate in such case?"

"5. Does not a proper construction of the acts of March 3, 1817 (3 Stat., 366), and March 30, 1868 (15 Stat., 54), require that both the Auditor and Comptroller shall state or certify the account or claim settled and attest their action on the face of the settlement certificate?"

A preliminary inquiry arising in connection with the first question is, What are the relative duties of the Second Comptroller and (say) the Third Auditor, touching the settlement of accounts? The answer, it is obvious, must depend entirely upon the provisions of law which prescribe the duties of these officers in that regard. Formerly those provisions were contained in the act of March 3, 1817, chap. 45; but that act has been superseded by the Revised Statutes, and they are now to be found in sections 273 and 277 of the latter. From these sections I extract so much as is material to the present inquiry.

Section 277 declares: "The Third Auditor shall receive and examine all accounts relative to the subsistence of the Army, the Quartermaster's Department, and generally all accounts of the War Department other than those provided for; all accounts relating to pensions for the Army, and all accounts for compensation for the loss of horses and equipments of officers and enlisted men in the military service of the United States, and for the loss of horses and equipments, or of steamboats, and all other means of transportation in the service of the United States by contract or impressment; and after the examination of such accounts he shall certify the balances, and shall transmit such accounts, with all the vouchers and papers and the certificates, to the Second Comptroller for his decision thereon."

Section 273 makes it the duty of the Second Comptroller

Settlement of Accounts at the Treasury.

"to examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred."

Here it is plainly made the duty of the Auditor to receive and act on the account in the first instance, and, after acting thereon, to transmit it with the result of his action to the Comptroller for revision; whereupon it becomes the duty of the Comptroller to pass on the same. Thus every account falling within the scope of the provision first above quoted is required to undergo, successively, an examination by the Auditor and an examination by the Comptroller. The action of the Auditor is primary altogether, and not definitive; while that of the Comptroller is wholly revisory, and final. The decision of this officer upon the account, after its transmission to him, governs the settlement thereof; it is that in and by which the balance for or against the Government is in such settlement ultimately ascertained and determined. This balance it is moreover made the duty of the Comptroller to certify "to the Secretary of the Department in which the expenditure has been incurred;" a provision which will be considered further on.

But, again, the duty of the Comptroller is "to examine all accounts settled by the Auditor." The word "settled," as here employed, is equivalent in meaning to "finally acted upon." It signifies no particular form of action; it applies as well to accounts which after examination by the Auditor have been rejected or disallowed, and in respect of which consequently no balances are reported by him, as to accounts which upon examination he has admitted and whereon he reports balances. When, for instance, an account of the former description has been transmitted to the Comptroller, with the action of the Auditor thereon formally stated, it is then regularly before the Comptroller, who may or may not, after examination, concur in the action of the Auditor disallowing the account. Should he not concur therein, but, on the contrary, find and admit a balance due the claimant, the account would thereby be as effectually *closed*, so far as the accounting officers are concerned, as if he had concurred in the action of the Auditor. This is equally true of an account which the

Settlement of Accounts at the Treasury.

Auditor, instead of rejecting, admits and forwards to the Comptroller, reporting a balance thereon in favor of the claimant. The Comptroller, on revision, may agree with the Auditor as to the balance, or increase or diminish it, or disallow the account entirely; in either of which events the matter becomes closed. The above statutory provisions do not appear to contemplate any further action by the Auditor, whatever the result of the Comptroller's action may be, after the account reaches this stage in the accounting process. So that, upon receiving the examination and decision of the Comptroller, given in the exercise of his revisory authority, it is to be deemed finally adjusted; and in case a balance is found and admitted by him, such balance, being thus ascertained and determined by settlement made in pursuance of the statute, forms the basis of a warrant or requisition for payment.

In the consideration of this subject I have not overlooked the first clause of section 191 of the Revised Statutes (taken from the act of March 30, 1868, chapter 36), where the expression occurs, "balances which may from time to time be *stated* by the Auditor and certified to the heads of Departments by the Comptroller," &c. That clause is simply declaratory of the *effect* which the settlement of an account by the accounting officers of the Treasury shall have upon the executive branch of the Government, subject to the qualification contained in the next and last clause of the section. Its purpose is not to define or explain the duties of those officers relative to the settlement itself. Hence, from the above phraseology, it is not to be inferred that Congress meant thereby to intimate that all balances certified by the Comptroller to the heads of Departments shall have been in the course of the settlement previously stated by the Auditor. This would imply either that the duty of the Comptroller is limited to mere approval or disapproval of the balance *as* found by the Auditor, or that it is the duty of the Auditor, after having once examined and transmitted the account with the result of his action to the Comptroller, to restate it in accordance with the decision of the latter, should that decision differ from the finding of the former; neither of which propositions seems to be deducible from, or in harmony with, the provisions hereinbefore adverted to, wherein the duties

Settlement of Accounts at the Treasury.

of those officers are expressly set forth. Perhaps in a majority of the settlements made the balances which are certified by the Comptroller will also be found to have been previously stated by the Auditor—a circumstance due to the concurrence of the former in the views of the latter, and to nothing else; and the employment of the phraseology referred to may be attributed to the fact that what seemed to be the common course of official action in the greater number of cases wherein balances are certified, was taken to be the common course in all such cases. However, if the language employed is suggestive of any question, it would seem to be (not whether all balances certified to by the Comptroller must regularly have been *stated* by the Auditor, but) whether the provision in which such language appears extends to any balances except those which the Auditor and Comptroller have concurred in finding; as to which I may observe that the design of Congress was manifestly to include all balances arising upon the settlement of public accounts, which it becomes the duty of the Comptroller to certify to the heads of Departments.

Recurring again to the first question, the state of facts on which it is based I assume to be as follows: The Auditor, having received and examined an account against the Government, rejects it, and accordingly declines to report any balance thereon, but transmits it, with his action, to the Comptroller for revision, who, after examination, decides that there is a balance due the claimant. Upon this the point is, what further proceeding should now be had by either or both of these officers in order to a proper settlement of the account?

The answer I give is, that no further proceeding by either or both is required to be had. The reason appears in what I have above written; it is, that when an account, after having been acted upon by the Auditor, receives the examination and decision of the Comptroller, it is *then* finally adjusted; it has passed through the whole of the accounting process, and nothing more remains to be done to complete the settlement. Of course the action of the Auditor, whatever it may be, is assumed to appear in due form; and so with regard to the action of the Comptroller.

Settlement of Accounts at the Treasury.

The second question involves an inquiry as to the requirements of the law in regard to the certifying of balances by the Comptroller to the heads of the Departments. The law makes it his duty not only to revise "all accounts settled" by the Auditor, but to "certify the balances arising thereon" to the head of the Department to which they relate. Here it is clear that the accounts whereon the Comptroller is authorized to certify balances as aforesaid are accounts which have previously been passed upon by the Auditor, and none other. And I think the head of a Department, to whom a balance is certified by the Comptroller, is entitled to some positive evidence that the account on which it arises has undergone previous action by the Auditor. This might appear by the certificate of the Comptroller being attached to or accompanied by the formal statement of the Auditor, or by an appropriate recital in the certificate itself, or otherwise. In answer to this question, then, permit me to say that where the certificate of the Comptroller is unaccompanied by the Auditor's action, or does not affirmatively show that the account has been acted upon by the latter, a case is presented which would, in my opinion, justify the head of the Department in withholding his requisition for payment of the balance without further knowledge of the matter. The response just made to the second question is also submitted as an answer to the fourth.

With respect to the third question: If by the words "above-mentioned certificate," used in this question, is meant a certificate that "wholly ignores the action of the Auditor," which I take to be their natural import, the certificate would remain, after the decision of the Comptroller upon the facts, still open to the objection pointed out in the answer to the second question.

My answer to the remaining question, the fifth, sufficiently appears in what has been already said in connection with the first and second questions, where I have considered, not the acts of March 3, 1817, and March 30, 1868, which are referred to in the fifth question, and which are no longer in force, but the sections of the Revised Statutes embodying the provisions of those acts.

Settlement of Accounts at the Treasury.

In order to make them somewhat more direct and explicit, and at the same time to present them in a more concise shape, I will here recapitulate the responses which I return to the questions submitted:

1. To the first question my answer is, that in the case put no other formal proceeding need to be pursued than that the Comptroller shall certify the balance which he finds to be due, and that his certificate be accompanied with authentic or satisfactory evidence of previous action by the Auditor on the same subject.

2. To the second, my answer is in the negative, on the ground that previous action by the Auditor upon the account must be shown to the head of the Department before he can be required to act.

3. To the third, my answer is in the negative, on the same ground.

4. To the fourth, my answer is in the affirmative, on the same ground.

5. To the fifth, my answer is that the statutes do not require that "the statements and certificates of the Auditor and Comptroller should both appear upon the face of the settlement certificate," if by the latter is meant the paper containing the certificate of the Comptroller. That action has been had by the Auditor upon the account to which the certificate relates must be shown to the Secretary, but the action of the Auditor need not be incorporated in the certificate of the Comptroller or form part of the same document. In this connection, however, I may add that the practice which prevails in the office of the First Comptroller of the Treasury, and which, I am informed, is of very long standing, appears to me to be preferable.

The papers which accompanied the questions propounded by your Department are herewith returned.

I have the honor to be, very respectfully,

ALPHONSO TAFT.

Hon. J. D. CAMERON,
Secretary of War.

Drawback on Firearms.

DRAWBACK ON FIREARMS.

In order to be entitled to drawback on firearms, under sections 3019 and 3020, Rev. Stat., the statute does not require that they shall have been made entirely of imported material, excepting *only* their stocks. It is sufficient if imported material has been used in their manufacture exceeding in value one-half of the value of the whole of whatever kinds of material have been so used, including their stocks, the latter being made of wood of American growth.

DEPARTMENT OF JUSTICE,

August 4, 1876.

SIR: On the 5th of May last the Secretary of the Treasury addressed a communication to the Attorney-General, requesting an opinion on a question which has arisen upon a claim for drawback made by the Providence (R. I.) Tool Company, under sections 3019 and 3020 of the Revised Statutes, on certain firearms manufactured and entered for exportation by that company.

The statutory provisions referred to read as follows:

"SEC. 3019. There shall be allowed on all articles wholly manufactured of materials imported, on which duties have been paid when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury. Ten per centum on the amount of all drawback so allowed shall, however, be retained for the use of the United States by the collectors paying such drawbacks respectively.

"SEC. 3020. Where firearms, scales, balances, shovels, spades, axes, hatchets, hammers, plows, cultivators, mowing-machines, and reapers, manufactured with stocks or handles made of wood grown in the United States, are exported for benefit of drawback under the preceding section, such articles shall be entitled to such drawback in all cases when the imported material exceeds one-half of the value of the material used."

It would seem, from the communication of the Secretary and accompanying papers, that the stocks and some of the smaller metallic parts of the arms mentioned are made of domestic material, but that the remaining parts, comprising the

Drawback on Firearms.

barrels, bayonets, locks, &c., are made of imported material. The imported material used in the manufacture of the arms, I understand, is alleged by the company to exceed in value the domestic material so used, and it is upon the former that the drawback is claimed.

The doubt in the case appears to be whether the statute does or does not require that the arms, in order to be entitled to drawback, shall have been manufactured *wholly* of imported material, with the exception of the stocks.

The solution of this question depends, I think, entirely upon the interpretation to be placed upon the language of section 3020, declaring that "such articles (*i. e.*, firearms and other articles enumerated therein whose stocks or handles are made of wood grown in the United States) shall be entitled to such drawback in all cases *when the imported material exceeds one-half of the value of the material used.*" This language does not appear to me to be susceptible of an interpretation so restrictive as to limit its application to those cases only where the stock is made of domestic material and the remaining parts of the gun are all made of imported material. The words descriptive of the cases to which the provision extends are "*when the imported material exceeds one-half of the value of the material used.*" Here the requirement on this head manifestly is, not that all of the material of which the gun is manufactured, exclusive of the stock, shall be imported, but that the value of the imported material used in its manufacture shall exceed one-half of the value of all the material so used, including the stock. The words seem to admit of no other construction. Hence, where a gun is made of materials partly domestic and partly imported, of the *whole* of which materials above one-half in value is imported—the stock being manufactured of wood of American growth—it would seem to come clearly within both the letter and the meaning of the provision adverted to, even though some parts of the gun, besides its stock, are of domestic material.

My opinion is, then, that the statute does not require that the firearms, in order to be entitled to drawback, shall have been made entirely of imported material, excepting *only* their stocks; but that they become entitled to drawback thereunder if imported material has been used in their manufacture ex-

Washington Monument.

ceeding in value one-half of the value of the whole of whatever kinds of material have been so used, including their stocks ; which latter, however, must be of wood of the growth of the United States.

The papers received at this Department with the communication of the Secretary are herewith returned.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. LOT M. MORRILL,

Secretary of the Treasury.

WASHINGTON MONUMENT.

Provisions of the act of August 2, 1876, chap. 250, entitled "An act providing for the completion of the Washington Monument," examined and explained.

The act contemplates that the joint commission, by the use of the sum appropriated and such money and materials as may be collected by the Washington National Monument Society, shall continue the construction of the monument and carry it forward towards completion, not that it shall be completed within the sum appropriated ; and, furthermore, that the plan adopted and partly executed by the society shall be followed by the commission.

The entire direction and supervision of the work are intrusted to the joint commission.

DEPARTMENT OF JUSTICE,

August 12, 1876.

SIR : Under date of the 8th instant, the Secretary of State incloses to me a copy of the "act providing for the completion of the Washington Monument," and also a letter addressed to you by the secretary of the Washington National Monument Society, and states that you desire me to examine the act and advise you what is necessary to carry it into effect, and what will be the power of the joint commission named in it.

I have examined the subject, and have the honor to submit my conclusions, as follows :

First, as to the powers conferred upon the joint commission :

The appropriation made by the act is "to *continue* the construction of the monument ;" that is, to take up its construction where it is now left by the society, and carry it forward towards completion.

The first proviso in the first section directs that before the

Washington Monument.

expenditure of any portion of the appropriation the society "shall transfer and convey to the United States in due form all the property, easements, rights, and privileges, whether in possession or in action or in expectancy, belonging to the said corporation ;" which duty the society, it appears, is ready to perform. Upon the execution and delivery of a deed making such transfer and conveyance to the United States the joint commission becomes the agent of the United States in place of the society.

The second proviso, that nothing in the act "shall be so construed as to prohibit said society from continuing its organization for the purpose of soliciting and collecting money and material from the States, associations, and the people, in aid of the completion of the monument, and acting in an advisory and co-operative capacity with the commission * * * until the completion and dedication of the same," indicates that Congress considered that the sum appropriated might not be sufficient to complete the work. Otherwise the invitation thus extended to the society would be superfluous. And it seems to be a necessary inference from this provision allowing the society to continue its organization for those purposes, taken in connection with the words expressing the object of the appropriation "to *continue* the construction of the Washington Monument," that Congress meant to authorize the commission to proceed as far as possible by the use of the annual sums appropriated and such money and materials as might be collected by the society ; that is to say, to continue the construction, and to complete it, if possible, with the means so provided. The act, it is true, is entitled "An act providing for the completion of the Washington Monument," but its provisions do not correspond with its title ; these referring only to the continuance of the construction of the monument, and nowhere declaring that it shall be completed within the sum appropriated.

And I am of opinion that in the construction, the continuance of which is thus provided for, it was understood and intended that the plan adopted and partly executed by the society must be followed by the commission, there being nowhere in the act, either in terms or by implication, any discretion conferred upon the commissioners in that respect.

Washington Monument.

Second, as to the steps necessary to carry the act into effect.

The first thing to be done is that required of the society, viz: the execution and delivery of a deed making the transfer and conveyance described in the first proviso. This done, the commission will be authorized to expend so much of the appropriation as may be necessary to make a thorough examination of the foundation of the monument required by the second section of the act. If the same shall be found insufficient, nothing further is to be done until after further action by Congress.

But should the foundation be found sufficient, the commission will proceed with the construction, and with reference to this the terms of the last clause of the first section are to be noticed: "And the construction of said monument shall be * * * in accordance with the laws regulating contracts and the construction of public buildings by the Treasury Department."

This direction is not clearly expressed, and in one particular is inaccurate. By the words "laws regulating contracts," of course those provisions of the Revised Statutes relating to contracts in general by Departments or agents of the Government are meant, reference to which is subjoined. (Sections 3679, 3737, 3739, 3741, 3742, 3743.) But there are no provisions in the statutes regulating the construction of "public buildings by the Treasury Department," apart from such as relate to such construction by any other Department. Of these, section 3733 provides that no contract for the erection of any public building or for any public improvement shall bind the Government to pay more than the amount appropriated for the specific purpose. Section 3734 relates to "new buildings for the use of the United States," and provides that before the commencement of such buildings "plans and full estimates therefor shall be prepared and approved by the Secretary of the Treasury, the Secretary of the Interior, and the Postmaster-General." In this section the only provision applicable is that relating to estimates of cost and keeping the cost within the estimates. The plan, as before stated, is that upon which the monument is now partly constructed, and the entire direction and supervision of its

Desertion—Limitation for Offense of.

further construction are intrusted to the joint commission named in the act.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

The PRESIDENT.

DESERTION—LIMITATION FOR OFFENSE OF.

The two years' limitation provided by the one hundred and third Article of War is applicable to the offense of desertion.

The limitation begins to run from the commission of the offense, excepting in a case where, by reason of "manifest impediment," the accused is not amenable to justice within two years from that time. In such case it begins to run from the removal of the impediment.

Desertion is a *continuing offense*—an offense which may endure (i. e., be continually committed) from day to day after the period of its completion. But the continuing commission thereof is limited by the obligation to serve imposed upon the deserter by his engagement. When that obligation ceases to exist, the commission of the offense necessarily terminates, and the limitation then begins to run in cases not excepted.

Enlistments are required to be "for the term of five years." By his engagement the soldier is bound for a *specific term* of service, the last day of which is as much fixed by the contract as the first. With the last day of the term his engagement expires, and with the expiration of his engagement the obligation to serve, thereby imposed, is at an end. This results, notwithstanding there has been an infraction of the contract by desertion or otherwise, unless the soldier, before the term is up, consents to an extension.

The provision in the forty-eighth article of war, that a deserter "shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment," is a penal provision. It does not, by its own force simply, work a prolongation of the term originally contracted. It operates only after a conviction.

Held accordingly, in case of desertion by an enlisted soldier, that (excepting where the offender has previously surrendered himself or been apprehended, or where, by reason of manifest impediment, he is not amenable to justice) the limitation begins to run from the last day of the term for which he enlisted.

Absence without leave is not *per se* sufficient to prevent the limitation from running.

DEPARTMENT OF JUSTICE,

September 1, 1876.

SIR: I have examined the "Notes on the one hundred and third article of war," prepared by the Adjutant-General of

Desertion—Limitation for Offense of.

the Army, which were submitted to the Attorney-General by the Secretary of War under cover of a letter dated the 14th of October last, requesting an opinion upon the questions suggested in the former paper relative to the operation of the limitation contained in the above-mentioned article with respect to the offense of desertion.

That article reads thus: "No person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period." (Rev. Stat., p. 239.)

The language of this provision is almost word for word that of the eighty-eighth article of war, in the act of April 10, 1806, which was previously in force (see 2 Stat., 369); and it has precisely the same meaning and effect.

The questions suggested with reference to the article above quoted seem to be (1) whether the limitation of two years therein provided applies to the offense of desertion; if so, then (2) when does the limitation begin to run in cases of desertion; and (3) whether *mere absence without leave* by a deserter from the company, detachment, or regiment to which he belonged, prior to his capture or voluntary surrender, is alone sufficient to place him within the exception contained in that article, and so prevent the limitation from running in his favor during such absence.

I. On examining the two opinions upon cases of desertion which have emanated from this Department (see 13 Opin., 462, and 14 Opin., 266), and which are cited and commented upon in the "notes," in each of them I find it to be *assumed*, rather than professedly or formally decided, that the limitation in the eighty-eighth article of war, then in force—which, as I have already observed, is substantially the same as the one hundred and third article of war, now in force—included the offense of desertion. In the earlier opinion the point chiefly (indeed, as it would seem, solely) considered was, whether the last clause of section 12 of the act of January 29, 1813 (2 Stat., 796), operated to repeal the eighty-eighth article of war as to the offense of desertion—the understanding of

Desertion—Limitation for Offense of.

the Department being, at that time, that the article itself had always been treated in practice as applying to that offense; while in the later opinion the only point under consideration was, whether the accused, upon the facts presented, came within the exception contained in the same article, so as to prevent the limitation from running in his favor. I have, however, given the subject of the applicability of the limitation in question to desertion careful examination, and the conclusion at which I arrive is that it applies as well to that offense as to any other cognizable by a general court-martial.

Before the act of April 10, 1806, our military code was made up almost entirely of the rules and articles for the government of the troops which had been established prior to the adoption of the Constitution, and were continued in force thereunder by statutory provision. Those rules and articles had been enacted by the Continental Congress and the Congress of the Confederation during, and shortly after, the revolutionary war. They were mainly taken from the English mutiny act and articles of war existing at that period, and adapted to our service. But they do not appear to have contained any provision fixing a limitation for the trial and punishment by court-martial of military offenses. The first provision of this kind known to our military code is found in the articles of war established by the act of 1806, which superseded the rules and articles previously in force, of which mention has just been made. I refer to the limitation provided in the eighty-eighth article of war, contained in that act; and as this article corresponds in terms with, and was undoubtedly copied from, a similar provision in the English mutiny act, then and still in force, we are naturally led to inquire how the latter has been understood in the British service.

From the time of the enactment of the first mutiny act by Parliament, in 1689, down to 1760, no limitation for military offenses existed in the British military code. Limitation was first introduced therein by the mutiny act of 1 George III, chap. 6, sec. 78, which provided: "That no person shall be liable to be tried or punished for any offense against any of the said acts (referring to former mutiny acts and to the one then being enacted) unless such offense shall have been com-

Desertion—Limitation for Offense of.

mitted within three years; except only for the offense of desertion." This provision was re-enacted in each succeeding mutiny act down to 1800 or 1801, when the clause expressly excepting desertion from the benefit of the limitation was omitted, and the rest was recast, and, with some additional matter introduced therein, formed into the following more elaborate provision, which, so far as I am able to discover, first appears in the act of 41 George III, chap. 11, sec. 88, passed March 24, 1801: "That no person shall be liable to be tried and punished for any offense against any of the said acts or articles of war which shall appear to have been committed more than three years before the issuing of the commission or warrant for such trial; unless the person accused, by reason of his having absented himself, or of some other manifest impediment, shall not have been amenable to justice within that period; in which case, such person shall be liable to be tried at any time not exceeding two years after the impediment shall have ceased."

An English writer on military law, who is regarded as respectable authority, remarks that the offense of desertion, *prior* to 1800, was excepted from the limitation for the trial and punishment of military offenses by court-martial in the British service; the remark clearly implying that since 1800 it has been otherwise, and that the limitation has from that period extended to that offense (see Hough's Improved Articles of War, edition of 1836, p. 114, note 4). But other English writers on the same subject whose works I have consulted are silent on the point whether the later of the two provisions last above quoted applies to desertion, and I find nothing elsewhere in relation thereto. Yet I incline to the view that this arises from the absence of any doubt having been entertained that such later provision, which has subsequently appeared in the mutiny act, year after year, down to the present time, is applicable to that offense. And I think that the provision is susceptible of no other construction.

Clearly it was the understanding of Parliament that the offense of desertion would come within the limitation provided by the first enactment (act of 1 George III, chap. 6, sec. 72) but for the *exception* excluding it therefrom. But the limitation provided by the second enactment (act of 41 George III,

Desertion—Limitation for Offense of.

chap. 11, sec. 88) is in terms not less general and comprehensive; and the omission of the exception just adverted to may well be taken to signify that the offense of desertion was intended to be included thereby. The clause in this last enactment, viz, "unless the person accused, by reason of his having absented himself, or of some other manifest impediment, shall not have been amenable to justice," &c., embraces persons accused of any offense to which the limitation extends, and can have no *special* application to deserters.*

The language of the eighty-eighth article of war is nearly the same as that of section 88 of the 41 George III, chap. 11, down to the end of the clause just quoted.

It is fair to presume that when the former was adopted the history of the legislation from which it was taken was familiar to Congress, and that the provision was intended by that body to have a similar scope and effect to what the corresponding English provision possessed. That the latter extended to desertion, I do not regard as at all doubtful.

At this point I may remark that in the opinion heretofore given by this Department, to which reference is above made (see 13 Opin., 462), upon the point whether the last clause of section 12 of the act of January 29, 1813, had the effect to do away with the limitation imposed by the eighty-eighth article of war, so far as the offense of desertion is concerned, I fully concur. There is no inconsistency between the two provisions; they are capable of standing together; and, what is more, they now actually stand together in the later legisla-

* NOTE.—The law of the British service, in regard to limitation for military offenses, has recently undergone modification. By the army discipline and regulation act of 1879 (42 and 43 Vict., chap. 33) it is provided, in section 154: "A person shall not, in pursuance of this act, be tried or punished for any offense triable by court-martial committed more than three years before the date at which his trial begins, except in the case of the offense of mutiny, desertion, or fraudulent enlistment; but this section shall not affect the jurisdiction of a civil court in the case of any offense triable by such court, as well as by court-martial; and where a soldier has served continuously in an exemplary manner for not less than three years in any corps of Her Majesty's regular forces, he shall not be tried for any such offense of desertion (other than desertion on active service), or of fraudulent enlistment, as was committed before the commencement of such three years," &c.

Desertion—Limitation for Offense of.

tion (see the forty-eighth and one hundred and third of the present Articles of War, Rev. Stat., sec. 1342.)

In the "notes" before me it appears to be acknowledged that the limitation provided by the one hundred and third (formerly eighty-eighth) article of war extends to the offense of desertion; but the view taken is that the provision does not run until after the deserter comes within the control of the Government, or until after his apprehension or surrender (see p. 3, near the top, and also the foot of p. 6); and what is there discussed would seem to be directed not so much to the question whether the limitation applies to that offense as to the question when its running in favor of the offender commences. Without pursuing the former of these subjects further, I will proceed to examine—

II. Next, as to the time when the limitation begins to run in cases of desertion. By the one hundred and third article of war, quoted above, the limitation therein provided runs from the commission of the offense, except in a case where, by reason of some "manifest impediment," the accused is not amenable to justice within the period of the limitation; that is to say, within two years from the commission of the offense. In such a case, though the article does not in express terms so declare, yet it was doubtless intended by the legislature that a like limitation should run from the cessation or removal of the impediment. Hence, there are two points of time, from one or other of which, according to the circumstances of each case, the limitation may begin to run, viz, the day of the commission of the offense and the day of the removal of the impediment. However, only the former of these need be considered here.

It is claimed in the "notes" that desertion is a *continuing* offense, and that the limitation does not begin to run until the criminal act ceases.

In this view of the nature of that offense, and of the period from which, with respect thereto, the limitation commences to run, I fully concur. But it is also claimed that the criminal act does not cease until the deserter is apprehended or surrenders himself up, whensoever this may be. On that point, the cessation of the offense, I entertain a different view, which will be stated presently.

Desertion—Limitation for Offense of.

A continuing offense is one which endures after the period of its consummation. (See 1 Whart. Crim. Law, 7th ed., sec. 449a.) A familiar instance of such an offense is a public nuisance whilst unabated. In regard to offenses of that nature, the same rule would seem to apply in computing the time allowed for commencing a criminal prosecution which applies in cases of continuing acts, such as trespass or imprisonment, for which civil actions may be brought. As, in the latter, the time allowed for bringing the action is to be computed from the day of the termination of the act (see Maxwell on Statutes, 312), so, in the former, the time allowed for commencing the prosecution is to be computed from the day of the termination of the offense, or, in other words, the day on which its commission ended. (1 Whart. Crim. Law, *supra*.)

Desertion may, in general, be defined to be the willful abandonment of the military service by a soldier or officer duly enlisted or in the pay of the Government (see forty-seventh article of war, Rev. Stat.) *without leave and without an intention to return*. The offense is complete at the time of the quitting the service; yet, as already intimated, it is continuing in its nature, and may endure after the period of completion. This feature of the offense, that of being *continuous*, is recognized in the military jurisprudence of other countries. In that of Great Britain, its recognition is manifested in various ways; as, for instance, in the one hundred and seventy-second of the British articles of war of the year 1872, which declares forfeited the pay and service of a convicted deserter for the "day or days during which he was in a *state of desertion*"; and also in the form of charge, approved by modern authority on British military law, against a deserter who has re-enlisted in another corps, viz, "having whilst in a *state of desertion* from the * * * enlisted into the," &c. (See Clodes's Military Law, pp. 277 and 311.) The phrase "*state of desertion*," as here used, signifies a condition of persistence in that offense, and presupposes a possible continuation from day to day of the same offense originating in the same criminal act. In the military jurisprudence of France it is even more distinctly acknowledged. There desertion is in direct terms declared to be a "*délit successif*," an offense which is renewed each moment and day the delin-

Desertion—Limitation for Offense of.

quency lasts. (See *Guide des Tribunaux Militaires*, par De Chénier, ed. of 1853, vol. 1, p. 33; *ibid.*, vol. 3, p. 236; *Commentaire sur le Code de Justice Militaire*, par Foucher, ed. of 1858, p. 555 *et seq.*) In German jurisprudence, the continuous nature of the offense is likewise recognized, as is apparent from the doctrine prevailing there in regard to the time at which the limitation in favor of the deserter begins to run. (See below the extract quoted from Holtzendorff's *Rechtslexikon*.) And I may add that the twenty-first section of the act of Congress of March 3, 1865, chap. 79, imposing additional penalties for desertion, as the provision is interpreted in the case of *Huber v. Reiley* (53 Pa. St., 112), seems to proceed on the same idea as to the nature of that offense.

The offense of desertion being, then, one that may continue from day to day, and the limitation of prosecutions therefor dating from the day of its cessation, it is important to determine when the offense ends.

It appears to me that the *continuing* quality of the offense, so to speak, is altogether dependent upon the particular relation subsisting at the time between the offender and the Government, which, in the case of an enlisted soldier, springs wholly out of his contract of enlistment. For it is only in view of the fact that the obligation to serve, imposed by his engagement, remains in full vigor after the desertion takes place, and that persistence in the latter is a continual violation of that obligation, that the offense can properly be said to be continuous. Hence, when the obligation ceases to exist, the offense necessarily terminates.

This would seem to be an established principle in the military jurisprudence of Germany. Thus, in Holtzendorff's *Rechtslexikon*, title *Desertion*, it is observed: "The offense of desertion is *complete* at the period of the soldier's flight; yet the *limitation* (*verjährung*) of prosecutions on account of desertion begins to run only from the day on which the deserter would have fulfilled his obligation to serve had he not deserted." There, as here, it is a general rule of law that with continuous offenses the limitation begins with the ceasing of the criminal act. (See Berner's *Lehrbuch der Strafrechts*, p. 301, cited in Whart. on Crim. Law, sec. 449, *a*; also Marezoll's *Criminalrecht*, 2d ed., p. 208.) So that, from the observation

Desertion—Limitation for Offense of.

just quoted, it may fairly be inferred, not only that desertion is regarded there as a continuing offense, but that the offense itself is considered to cease on the expiration of the term for which the deserter was originally required to serve.

In France, prior to the year 1857, the prevailing doctrine was, that in desertion the limitation (prescription) runs only from the time of the surrender or arrest of the deserter. Yet this doctrine appears to have rested solely upon the ground that as the "*jugement par contumace*," or proceeding against the offender while at large (allowable there, as a general thing, in other crimes), was expressly forbidden in cases of desertion, this offense *thereby* became imprescriptible up to the time mentioned, on the principle that prescription cannot run against those who are unable to act. (See a decision of the Cour de Cassation, dated February 7, 1840, which is quoted in the *Guide des Tribunaux Militaires*, par De Chénier, vol. 1, pp. 34, 35.) It was proposed to modify this rule, and, on the idea that the offense continued only so long as the service was due, to date the prescription from the day of the expiration of the term of service which the deserter owed at the time of his departure. The rule underwent modification, but not in accordance with the principle thus suggested. By a provision of the military code, promulgated in that year (1857), the limitation was made to commence uniformly from the day when the deserter attained the age of forty-seven, whether his term of service would then have been completed or not. (*Commentaire sur le Code de Justice Militaire*, par Foucher, pp. 556-7.) However, in both the earlier and the later law of France touching the offense of desertion, the time when the limitation commenced was not controlled by the cessation of the criminal act, but by other considerations entirely; and so nothing can be drawn therefrom of any special importance relative to the particular branch of the subject now in hand.

In England, at what period the "state of desertion" ends and the limitation begins—in other words, when the continued perpetration of the crime is deemed to cease—the means of information at my command do not enable me to say. Formerly, when the period of enlistment in the British army was unlimited, the obligation to serve continued until the soldier was regularly discharged; and it may be that, as a consequence of

Desertion—Limitation for Offense of.

this, the limitation in case of desertion ran only from the time of the surrender or arrest of the deserter. And here, perhaps, originated the maxim, "Once a deserter, always a deserter," until apprehended, &c., which is stated in the "notes" to have prevailed in our own army circles from the foundation of the Government, and may have been derived from the British service—a maxim that might well hold good where the engagement is for life, but be inapplicable in the case of a limited engagement. At the present time enlistments in the British army are for a limited period, and with respect to these enlistments it is remarked, in a recent work on British military law, that "effluxion of time terminates the contract." (Clodes's Military Law, p. 236, note 4.) Still, in view of the sixth and seventh sections of the English army enlistment act of 1867, it is probable that the condition of a deserter in regard to liability to trial remains substantially the same as it formerly was when his engagement was unlimited.*

Enlistments in our service are required to be "for the term of five years." (Rev. Stat., sec. 1119.) By his contract of enlistment the soldier engages to serve in the Army for five years from the day on which he enlists, unless sooner discharged by proper authority. This engagement binds the soldier for a *specific term* of service, beginning at a certain time and running thence continuously day after day until the end is reached, the last day of the term being as much fixed by the contract as the first. Consequently, unless there exists some law when the contract is entered into providing for a contingent prolongation of the term beyond the period fixed by the latter, and the contingency happens within the term (see for instances of such a provision sections 4 and 7 of the British enlistment act of 1867), or unless the soldier before the term is up consents to an extension thereof, with the last day of the term his engagement necessarily expires, and with

* NOTE.—By the more recent act of 42 and 43 Vict., chap. 33, sec. 154 (see NOTE, supra, p. 156), a soldier who has served continuously in an exemplary manner for not less than three years in the British army is not liable to trial for desertion (except desertion on active service) where the offense was committed before the commencement of such three years. Other than this, there appears to be no limitation in favor of a deserter in the present military code of Great Britain.

Desertion—Limitation for Offense of.

the expiration of his engagement the obligation to serve thereby imposed is also at an end. And this would seem to result as well where there has been an infraction of the contract by desertion or otherwise as where it is fully performed.

That the term of enlistment expires with the last day thereof, as fixed by the contract, even though the soldier may have in the mean time deserted the service, is plainly recognized by section 17 of the act of May 30, 1796, section 18 of the act of March 16, 1802, section 16 of the act of January 11, 1812, section 12 of the act of January 29, 1813, and also by the forty-eighth article of war, in each of which it is provided that a soldier who deserts the service shall be tried and punished, “although *the term of his enlistment may have elapsed* previous to his being apprehended and tried.”

The sections just cited likewise provide that a deserter shall, “in addition to the penalties mentioned in the Rules and Articles of War, be liable to serve for and during such a period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment,” and the same provision is embodied in the article of war above cited (article 48), with the exception of the words “in addition to the penalties mentioned in the Rules and Articles of War.” This provision, however, is to be construed along with the other penal provisions relating to the offense of desertion, all of which contemplate a trial and conviction before the infliction of the penalty. It does not of itself operate to extend the term of service originally contracted, so as to *continue the offense correspondingly*, and thus postpone the time when the limitation begins. It comes into play only after a conviction; which may never take place, inasmuch as, before the order for the trial has issued, the full period of the limitation may have already run and barred the prosecution. That provision is the only one falling under my notice which imposes a liability upon the deserter to perform service beyond the term of his enlistment; and enough has been said to show that it does not, by its own force simply, prolong the term of service originally contracted, or, what is the same thing, prevent the termination of the soldier’s engagement at the time originally fixed.

Thus it seems that in our military service the contract of

Desertion—Limitation for Offense of.

enlistment must in all cases, even in that of desertion, be regarded as having expired when the last day of the term of enlistment therein fixed has elapsed. And since the obligation to serve depends on the contract, and necessarily ceases therewith, the offense of desertion, on grounds already set forth, must be deemed to terminate at the same time. In short, that offense may be viewed as *continuing* up to the end of the term of his engagement, but not beyond.

It follows that the limitation begins to run, in case of desertion by an enlisted soldier (unless the offender has previously surrendered himself or been apprehended, or unless, by reason of some manifest impediment, he is not then amenable to justice) from the last day of the term for which he enlisted. But in case of desertion by a commissioned officer, whose engagement is an unlimited one, it is otherwise; here, according to the principle above laid down, the limitation begins to run only from the date of apprehension or surrender.

III. The remaining subject for consideration relates to the *exception* contained in the act of limitation, which withdraws from the operation of the general provision, limiting the period of liability to trial to two years from the commission of the offense, those cases wherein the accused, by reason of some "manifest impediment," is not amenable to justice within that period; and the point is, whether *mere absence without leave* is sufficient to bring a deserter within that exception.

The language of the exception is, "unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice," &c. Absence, then, in order to bring the accused therein, must be such as to render him *not amenable to justice*.

The general signification of the word "amenable," in its modern sense as a law term, is "responsible, subject to answer in a court of justice, liable to punishment" (see Bouvier's Law Dictionary, *sub voce*; also the law dictionaries of Jacobs, Tomlins, Burrill, and Wharton). As used in the above provision, it would seem to mean: within the reach and power of the military authorities to bring to trial before a court-martial, *i. e.*, in a situation where the responsibility or liability to answer for the offense can be made effective, or, as Attorney-

Desertion—Limitation for Offense of.

General Black appears to have regarded it, within the jurisdiction of a court-martial. (See 9 Opin., 182, middle of page.) Unquestionably, absence in a foreign land would place the accused beyond such jurisdiction, and thus make him not amenable; so, it has been thought, would absence within the limits of this country, if he were where the military authorities, by reasonable diligence, could not discover him. (See 14 Opin., 267.) It would be difficult, perhaps impossible, to lay down any general rule whereby to determine in all cases under what facts and circumstances the accused may be deemed to be beyond the reach and power of the military authorities to bring him to trial, or beyond the jurisdiction of a court-martial. This is a matter which must needs be left, in each case, to the judgment of the court itself upon the particular facts and circumstances appearing therein, subject to revision by the proper authorities.

A deserter, while at large, is in a state of absence without leave. But, according to the above view, this absence does not *per se* render him not amenable. If he be not at the same time beyond the reach and power of the military authorities, or beyond the jurisdiction of a court-martial, he would still be amenable. Thus, where a deserter from one regiment re-enlisted in another regiment under an *alias* in about a year after the desertion: although *subsequent to the re-enlistment* and while with the Army he continued to be absent without leave from the former regiment just the same as prior thereto, yet as he was then where he might have been arrested and tried any day, it was considered by this Department that he was "amenable" at that time, and consequently did not come within the exception of the statute. (See Harris's case, 14 Opin., 265.) Other cases may easily be imagined wherein a deserter, continuing all the time in a state of absence without leave, would nevertheless be amenable to justice during the same time, for the like reason that he was where he might have been arrested and tried any day by reasonable diligence on the part of the military authorities. But the above actual case is enough to show that something more than the mere absence itself is required to take away from the accused the benefit of the limitation.

CIVIL ENGINEERS IN THE NAVAL SERVICE.

My opinion is that absence without leave is not, *per se*, sufficient to place a deserter within the exception mentioned.

Very respectfully, your obedient servant,
ALPHONSO TAFT.

Hon. J. D. CAMERON,
Secretary of War.

CIVIL ENGINEERS IN THE NAVAL SERVICE.

Civil engineers, appointed under section 1413 Rev. Stat., are officers of the Navy within the meaning of articles 36 and 37 of section 1624 Rev. Stat.

DEPARTMENT OF JUSTICE,
September 5, 1876.

SIR: Yours of the 23d ultimo, addressed to the Attorney-General, refers to his communication (to yourself) of the 19th ultimo, and asks, further, if civil engineers appointed under section 1413 of the Revised Statutes are *officers of the Navy*, especially within articles 36 and 37 of section 1624 of the same book.

Upon consideration I answer that question in the affirmative.

Such engineers are commissioned by the President after an appointment by him with the consent of the Senate; they receive pay which compares very well with that allowed to lieutenants, and which rises in proportion to the length of the term for which they serve; and they are entitled to a relative rank, to be defined by the President.

Having regard, then, to what Congress has provided as to the manner of their entering the Navy, and as to the position of trust and emolument which they hold therein, I conclude that the general word "officers," by which Congress has defined the class who are entitled to certain privileges when proceeded against for the purpose of being dismissed from the Navy, includes civil engineers.

It seems that as a general rule, unless some context shows that the word is used in a narrower sense, the term *officers of the Navy* in statutes, &c., includes *civil engineers*.

Very respectfully, your obedient servant,
S. F. PHILLIPS,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

Entrance and Clearance of Vessels.

ENTRANCE AND CLEARANCE OF VESSELS.

Section 2793 Rev. Stat. applies only to vessels engaged in the foreign and coasting trade which depart from or arrive at places established by law as ports wherefrom and whereat such vessels may be cleared and entered by the customs officials.

DEPARTMENT OF JUSTICE,

September 9, 1876.

SIR: I have considered the question suggested by your letter of the 20th of July last, as to whether the provisions of section 2793 of the Revised Statutes, which exempt from the payment of entry and clearance fees, or tonnage tax, vessels engaged in the foreign and coasting trade on our northern, northeastern, and northwestern frontiers, "departing from or arriving at a port in one district to or from a port in another district, and also touching at intermediate foreign ports," are limited to vessels which depart from or arrive at places that have been established as ports by law.

The word "port," as used in section 2793, is defined in section 2767 of the Revised Statutes to "include any place from which merchandise can be shipped for importation" [exportation, probably, was meant], "or at which merchandise can be imported." From this it would seem that, in the former section, the words "*port* in one district" and "*port* in another district" were intended to signify a place within each such district at which there is a custom-house, or at which customs officers are stationed, and where vessels engaged in the foreign and coasting trade mentioned can lawfully *clear* or *enter*, as the case may be; and the last clause of the same section, declaring that "such vessels shall, notwithstanding, be required to enter and clear," is corroborative of that view.

The conclusion I arrive at is, that the provisions of section 2793 apply only to vessels engaged in the trade therein referred to, departing from or arriving at places which, by or in pursuance of a law of Congress, have been established as ports wherefrom and whereat such vessels may be cleared and entered by the customs officials.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. LOT M. MORRILL,

Secretary of the Treasury.

Cession of Jurisdiction—Taxes.

CESSION OF JURISDICTION—TAXES.

The United States, in 1872, acquired title to a lot of ground in Saint Louis, Mo., by condemnation under a State statute, by the provisions whereof the jurisdiction of the State over the premises at the same time passed to the United States. Thereafter certain bills for unpaid taxes assessed for the years 1873, 1872, and previous years, were presented to the Treasury Department for payment, a lien on the premises for those taxes being claimed: *Held* that the State, in parting with its jurisdiction, relinquished its lien on the land for the taxes, and that they are not a proper charge against the United States.

DEPARTMENT OF JUSTICE,

September 13, 1876.

SIR: I have examined the tax bills against the new custom-house and post-office lot in the city of Saint Louis, Mo., which, with other papers, were transmitted to me under cover of a letter from Mr. Charles F. Conant, Acting Secretary of the Treasury, dated the 28th of June last. These bills are, in part, for taxes for the year 1873 and partly for taxes for the year 1872, and include also a bill for taxes for previous years, the whole amounting to upwards of \$8,000; and the following question is submitted in connection therewith, viz: Whether those taxes constitute "a lien upon said lot, and whether the United States are properly chargeable therewith?"

It appears by the papers that the title to the lot in question was acquired by the United States in the latter part of the year 1872, by proceedings in condemnation had in a court of the State under a State statute passed March 16, 1872. This acquisition did not take place until after the 1st of August, 1872; and it is claimed that, by the laws of Missouri, the lot on that date became liable to assessment for the taxes for the ensuing year (1873), and that a lien for these taxes then attached thereto. The lien for these taxes, including also that for the unpaid taxes for 1872 and previous years, it is further claimed, still affect the premises.

But, as I view this matter, the lien for those taxes became necessarily extinguished at the time of the acquisition of the property by the United States by the transfer of the *jurisdiction* over the premises to the latter, which, under the pro-

Compensation of Attorney.

visions of the aforesaid statute, took effect at the same time. The State, in parting with its jurisdiction, virtually relinquished whatever lien it may have had on the land for the taxes; since such lien depended for its enforcement solely upon the methods and agencies specially provided for that purpose by the State law, which, of course, ceased to be available after the land itself, by the transfer of jurisdiction, ceased to be within the sphere of the operation of that law. Moreover, I do not think that, irrespective of the lien, the taxes referred to, or any part thereof, are a proper charge against the United States.

I return herewith the tax-bills and papers mentioned.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. LOT M. MORRILL,
Secretary of the Treasury.

COMPENSATION OF ATTORNEY.

Previous to the act of June 22, 1870, chap. 150, (sections 363-366 Rev. Stat.,) C. & W. were retained, with the approbation of the Solicitor of the Treasury, to defend certain suits brought against R., formerly collector of the port of New York, for acts done by him officially. Services were rendered under this retainer between September, 1873, and April, 1875, which remain unpaid for: *Held* that the Treasury Department is authorized to settle and pay the claim for these services.

DEPARTMENT OF JUSTICE,

September 26, 1876.

SIR: Upon the 19th of June last your predecessor transmitted to the Department of Justice papers, herewith returned, relating to the claim of Messrs. Craig & Webster for services in defending suits brought against Herman J. Redfield, formerly collector of the port of New York, for acts done by him officially, and inquired whether or not the Treasury Department was authorized to recognize and pay the account. A reply, immediately prepared, owing to some inadvertency, was not forwarded.

Though the services were rendered between September 14, 1873, and April, 1875, yet it appears that they were but a continuation of those previously rendered in these same suits

Railway Post-Office Cars.

under a contract made therefor with the approbation of the Solicitor of the Treasury prior to the enactment of the statutes now embraced in Rev. Stat., sections 363-366, supposed to be an obstacle to the recognition and payment of the claim. The contract was a retainer of Webster & Craig in these suits, and the matters thereby put in contest as an entirety. This has been recognized ever since the passage of the statutes mentioned by payment for services up to September 14, 1873.

These enactments must be construed to be prospective in their operation, and not to affect valid existing contracts. Such contracts should still be executed agreeably to their terms. Accordingly, my reply is that the Treasury Department is authorized to liquidate this claim of Webster & Craig.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. LOT M. MORRILL,
Secretary of the Treasury.

RAILWAY POST-OFFICE CARS.

The compensation to railroad companies authorized to be fixed by sections 4002 to 4005 Rev. Stat., for the use of railway post-office cars furnished by them, is not affected by the provisions of the first section of the act of July 12, 1876, chap. 179.

DEPARTMENT OF JUSTICE,
October 7, 1876.

SIR: In yours of the 29th ultimo, addressed to the Attorney-General, you ask, in connection with business pending in your Department:

"Is the Louisville and Nashville Railroad Company entitled to pay, under the provisions of sections 4002 to 4005 Rev. Stat., without reduction, for the use of the railway post-office cars furnished by them and accepted by the Post-Office Department? Or, must their pay for the use of said cars be fixed by the provisions of said sections, with a reduction of ten per centum therefrom, under the provisions of the act of July 12, 1876, above cited?"

Railway Post-Office Cars.

The above provisions of the Revised Statutes reproduce an act passed on the 3d of March, 1873, (17 Stat., 558,) and referred to in the first section of an act passed on the 12th of July last, for a copy of which I am indebted to the papers transmitted by you.

So far as this section bears upon the above question it is as follows:

"3. For transportation by railroad, nine million one hundred thousand dollars: *Provided*, That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after the first day of July, eighteen hundred and seventy-six, for transportation of mails on railroad routes, by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by the first section of an act entitled 'An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes,' approved March third, eighteen hundred and seventy-three, for the transportation of mails on the basis of the average weight."

The reference in this latter section to the act by which the *rates* to be reduced were *fixed* and allowed is *parenthetical*, and suspends the logical connection between the words which precede and follow. By applying such parenthesis, viz: ("by the first section of an act entitled 'An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes,' approved March third, eighteen hundred and seventy-three,") it will be seen that the section expressly directs the deduction of 10 per cent. to be made "*from the rates fixed and allowed for the transportation of mails on the basis of the average weight*," and from these only.

I am therefore of opinion that the compensation for railway post-office cars is not affected by that provision.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The POSTMASTER-GENERAL.

Special Agents of the Post-Office Department.

SPECIAL AGENTS OF THE POST-OFFICE DEPARTMENT.

Where the duties of "special agents" employed by the Postmaster-General, under section 4017 Rev. Stat., concern the railway postal service, such agents may, so far (and so far only) as regards the performance of those duties, be placed under the supervision of one or both of the officers authorized to be appointed by the Postmaster-General by section 4020 Rev. Stat. to superintend the railway postal service.

DEPARTMENT OF JUSTICE,

October 9, 1876.

SIR: Yours of the 5th instant, addressed to the Attorney-General, presents for consideration the following case:

"Section 4017 of the Revised Statutes authorizes the Postmaster-General 'to employ such number of special agents as the *good of the service* and the safety of the mails may require.'

"The salary and *per diem* of the special agents appointed under this section are paid out of the appropriation for mail depredations and special agents.

"The duties of such special agents are not limited to depredations on the mails, but extend to all matters relating to the postal service outside of this Department.

"Section 4020 authorizes the Postmaster-General to appoint two agents to superintend the railway postal service, each of whom shall be paid out of the appropriation for the transportation of the mail.

"I desire now to be informed by you, and respectfully ask your opinion, whether, under these provisions of law, I am authorized to designate one of the agents appointed under section 4020 to superintend the railway postal service, and whose salary and *per diem* are to be paid out of the appropriations for mail transportation, to the supervision of the special agents appointed under section 4017, their services and duties."

The *special agents* authorized by section 4017 are not termed "special" from any necessary limitation upon the sphere of their duty in connection with the mails. Their commission from the Postmaster-General may extend only to a particular item of service or to the whole service. If any such be actually commissioned in connection with "the railway postal

Dutiable Value of Certain Wools.

service," mentioned in section 4020, or, if commissioned in general, then so far as their commission extends to such service, they may be subject to the charge of one or both of the "assistant superintendents" of that service, also mentioned in this latter section. But if the terms of their commission be not as above supposed, it seems that the jurisdiction of such superintendents cannot be extended to them.

The reply to your inquiry, therefore, is special, viz: That one of such *assistant-superintendents* may be designated to supervise any *special agent* appointed specifically to the department of "railway transportation," or to supervise any special agent having an indefinite commission *so far as he takes charge of railway transportation*; in other words, so far as the duties of the special agents and those of the assistant superintendents concern the same subject-matter, one of the latter may be designated to supervise the former.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The POSTMASTER-GENERAL.

DUTIABLE VALUE OF CERTAIN WOOLS.

Subject of the opinion of May 18, 1876, (viz, as to whether an export duty levied at the foreign port of shipment is or is not to be excluded in ascertaining the dutiable value of certain wools provided for in schedule L of section 2504 Rev. Stat.,) re-examined; and held that such duty is one of the "charges in such port" within the meaning of the provisions of that schedule, and should be excluded in determining the dutiable value of the wools—overruling said opinion (see ante, p. 105.)

DEPARTMENT OF JUSTICE,
October 23, 1876.

SIR: Ordinarily the Attorney-General will not feel called upon to review his own opinion or that of his predecessor; but will leave its correctness to be determined by the courts in an appropriate case. In the present instance the Secretary of the Treasury does not consider the opinion given May 18, 1876, as to the inclusion of the export tax in ascertaining the duty upon certain third-class wools, conclusive upon the ques-

Dutiable Value of Certain Wools.

tion now proposed by him. The subject will, therefore, be reviewed; although I apprehend that the difference between the inquiries then and now presented will be found to be one of phraseology rather than of substance.

It was then asked whether or not an export duty levied at the last port or place of shipment was to be deemed "a local or port charge" within the meaning of the Revised Statutes, section 2504, schedule L; the Treasury Department having ruled that it was *not* a local or port charge, but a national tax, and therefore to be added to the market value, in order to ascertain the dutiable value. A negative answer was returned to the question, placed upon the ground taken by the Secretary of the Treasury. It is possible that the language in which the inquiry was couched may have led to an erroneous conclusion. It substituted "local or port charge" for the statute phrase "charges in such port." The term "port charges," in mercantile parlance, has a technical meaning, and is generally employed to designate pilotage, light dues, &c.—charges to which the *vessel*, and not the cargo, is subject. Used in this sense, it is obvious that an export duty is not a port charge. But in the case of these third-class wools, shipped from Rosario, it is a charge imposed and payable *only* "at the last port or place whence exported to the United States." Clearly, it is a "charge" upon the goods, to whatever use, local or national, the revenue thence accruing is to be dedicated. It is a charge in the port of shipment, payable only there, and there only because of shipment. If, then, it is a charge accruing at that place, whatever its character, it is to be excluded from the computation of dutiable value; for this is to be determined by "excluding charges in such port."

The concluding statement in the opinion of the Attorney-General, given February 26, 1866, that "A careful examination of the Revised Statutes as they now stand makes it clear that the legislature intended to have the duty on carpet wools remain as mentioned in section 2504, schedule L, and hence the lawful duty upon such wool is 3 cents per pound," is undoubtedly correct, if its original value at the time and port of exportation does not exceed 12 cents a pound; *i. e.*, the value, exclusive of all charges accruing or imposed upon the wool after it has found a market in that port. It was not

Dutiable Value of Certain Wools.

proposed that sections 2907 and 2908 should impair the provisions relating to this class of goods found in section 2504, schedule L, but they were to remain subject to duty only as provided in this last-named section.

Different tariff acts have created various rules of assessment. By some a specific duty is imposed; sometimes one based upon the price paid by the importer, (3 Stat., 732, act of March 1, 1823, chap. 21, sec. 5; 2 Story C. C., 421;) sometimes the value of the principal markets in the country whence exported at the time of *purchase*, (act of August 30, 1842, chap. 270, secs. 16, 17, 5 Stat., 563; Greeley *vs.* Thompson, 10 How., 225;) sometimes the value in those markets at the time of exportation, (act of March 3, 1851, chap. 38, sec. 1, 9 Stat., 629; Morris *vs.* Maxwell, 3 Blatch., 143; Stairs *vs.* Peaslee, 18 How., 521;) and sometimes, as in the present instance, *its market value at the time and port of exportation*, (Sampson *vs.* Peaslee, 20 How., 571; Irvine *vs.* Redfield, 23 How., 170.)

The basis of duty, then, as to these wools, was their market value at Rosario upon the day the vessel sailed with them on board from that port, not their value when exported, nor on shipboard, nor when held for the purpose of exportation. The disposition to be made of them by the purchaser is not an element of their market value, hence not of their dutiable value.

The fact that before or after their purchase in that market at their fair value there the buyer determines to ship them to a foreign country, and pays the required charge at the port of exportation to enable him to carry out this purpose, has nothing to do with the correct basis of assessment, which is exclusive of such charges; *i. e.*, it is the naked market value of the property there as wool.

Suppose, owing to a declaration of war, accident to the vessel, or other reason, this wool had been relanded at Rosario, and sold there in the general, open market, upon the day the ship sailed thence—could any greater price have been obtained for the wool, would it have had any greater market value, because of the payment of the export duty?

As Congress intended to establish the value at the time and place of exportation as the dutiable value, the export

Forfeiture of Pay in the Navy.

duty there payable must be one of "charges in that port," which is to be excluded in determining this value.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. LOT M. MORRILL,

Secretary of the Treasury.

FORFEITURE OF PAY IN THE NAVY.

Officers and men in the naval service do not incur any forfeiture or loss of pay by confinement or suspension from duty under sentence of a court-martial, unless the forfeiture or loss be imposed by the sentence. Where forfeiture or loss of pay is made a part of the sentence of a court-martial, in addition to confinement or suspension from duty, the former may be remitted by the proper authority, in whole or in part, without also remitting the latter.

DEPARTMENT OF JUSTICE,

November 9, 1876.

SIR: I have considered the following questions, propounded in your letter to the head of this Department dated the 28th of January last, viz:

"1st. Does confinement or suspension from duty of officers or men under sentence of court-martial work, *ipso facto*, a forfeiture or loss of pay during such confinement or suspension?

"2d. Cannot the President of the United States or the Secretary of the Navy remit, in whole or in part, the forfeiture or loss of pay imposed by sentence of court-martial, when the sentence includes confinement or suspension from duty during the period covered by the forfeiture, without also remitting the confinement or the suspension from duty?"

These questions appear to have been suggested by a ruling of the Second Comptroller of the Treasury in the case of John F. Carr, a landsman in the Navy, to the effect that the latter is not entitled to pay for the period during which he was in confinement under sentence of a court-martial, notwithstanding there was a remission by proper authority of so much of the sentence as imposed forfeiture of pay. The grounds of this decision are explained in a communication of the Comptroller to you, dated February 22, 1875, in which he states "that, on general principles of law, a man who is ren-

Forfeiture of Pay in the Navy.

dered incapable, through his own misconduct, of fulfilling the stipulations of his contract of enlistment, can claim nothing under that contract. The Government," he adds, "agrees with the enlisted man that for a certain amount of service he shall receive a certain amount of pay. If the man, by his misconduct and necessary withdrawal from service, does not perform his part of the contract, the Government cannot be held to the fulfillment of its part thereof. The remission of a sentence may restore the man to service from the date thereof, but cannot replace the service lost while actually in confinement."

The Comptroller has, I think, misconceived the true basis of the right to pay in the case mentioned. In the naval, as in the military service, the right to compensation does not depend upon, nor is it controlled by, "general principles of law;" it rests upon, and is governed by, certain statutory provisions or regulations made in pursuance thereof, which specially apply to such service. These fix the pay to which officers and men belonging to the Navy are entitled; and the rule to be deduced therefrom is that both officers and men become entitled to the pay thus fixed so long as they remain in the Navy, whether they *actually* perform service or not, unless their right thereto is forfeited or lost in some one of the modes prescribed in the provisions or regulations adverted to. (Compare opinion of Attorney-General Hoar, 13 Opin., 104.)

I discover nothing in the law of the naval service which justifies the view that confinement or suspension from duty under sentence of a court-martial is attended by forfeiture or loss of pay, unless the forfeiture or loss be imposed by the sentence; and I accordingly answer your first question in the negative.

To your second question I reply, that where forfeiture or loss of pay is made a part of the sentence of a court-martial, in addition to confinement or suspension from duty, the former may be remitted in whole or in part without also remitting the latter.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. GEORGE M. ROBESON,

Secretary of the Navy

Refund of Pay, etc., in the Army.

REFUND OF PAY, ETC., IN THE ARMY.

On the 15th of December, 1870, P., a captain of cavalry, was discharged from service, at his own request, under section 3 of the act of July 15, 1870, chap. 294, receiving a year's pay and allowances. On the 19th of May, 1876, he was appointed a second lieutenant of infantry: *Held* that the provisions of the second section of the act of March 3, 1875, chap. 159, do not apply; and accordingly that P. is not required to refund the pay and allowances mentioned.

Section 2 of the act of 1875 is limited to those who were mustered out as "supernumerary officers" under section 12 of the act of 1870, and who subsequently to the act of 1875 are reappointed.

DEPARTMENT OF JUSTICE,

November 15, 1876.

SIR: Your communication of the 31st ultimo, in regard to the case of Second Lieutenant S. C. Plummer, Fourth Infantry, presents this question: Whether the second section of the act of March 3, 1875, chap. 159, requires that officer to refund the extra year's pay and allowances received by him on his discharge from service as a captain of cavalry, under the provisions of the act of July 15, 1870, chap. 294?

It appears that Lieutenant Plummer was discharged from service, at his own request, on the 15th of December, 1870, under the third section of the last-mentioned act, and that he was reappointed in the Army as a second lieutenant of infantry on the 19th of May, 1876.

The second section of the act of 1875, above referred to, is by its terms limited to persons who were mustered out as "supernumerary officers" under the twelfth section of the act of 1870, and who may thereafter (*i. e.*, subsequently to the act of 1875) be reappointed in the Army.

Clearly, then, the provisions of the said second section do not apply to the case of Lieutenant Plummer, he not having been mustered out as a supernumerary officer; and I may also add here that the first section of the act of 1875 is equally inapplicable thereto.

I am accordingly of the opinion that Lieutenant Plummer is not required by the act of 1875 to refund the pay and allowances in question.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. J. D. CAMERON,

Secretary of War.

Merchant Vessels—Jurisdiction.

MERCHANT VESSELS—JURISDICTION.

A merchant vessel, except under some treaty stipulation otherwise providing, has no exemption from the territorial jurisdiction of the harbor in which the same is lying.

The right "to sit as judges and arbitrators in such differences as may arise between the captains and crews," given to consuls, vice-consuls, &c., by article 13 of the treaty with Sweden and Norway of 1827, is limited to the determination or arbitrament of disputes and controversies of a civil nature, and does not extend to the cognizance of offenses.

If the conduct of the captains or of the crews, where differences arise between them, is such as to "disturb the order or tranquillity of the country," (which includes all acts, as against each other, amounting to actual breaches of the public peace,) the right of the local authorities to interfere, in the exercise of their police and jurisdictional functions, is reserved in said article.

Seemly that a more enlarged jurisdiction is conferred upon consuls in some other treaties, as *e. g.*, in the treaty with France of February 23, 1853, in the treaty with the German Empire of December 11, 1871, and in the treaty with Italy of February 8, 1868.

DEPARTMENT OF JUSTICE,
December 14, 1876.

SIR: I have the honor to state that since the receipt of the communication addressed to me by the Hon. J. L. Cadwalader, Acting Secretary, under date of the 14th of October last, in regard to the proceedings had before a justice of the peace in Galveston, Tex., against a part of the crew of the Swedish bark *Frederica* and *Carolina*, a merchant vessel, I have received a further report from the United States attorney for the eastern district of Texas, to whom a copy of that communication was sent. This report, together with the statement of the United States district judge therein referred to, I inclose herewith, and beg that they be returned to this Department when no longer needed by you.

The communication of the Acting Secretary contains a request for an expression of opinion touching the jurisdiction of the justice in the proceedings mentioned. I have considered this subject in the light of the information furnished by your Department and by the United States attorney, and will now proceed to give my views thereon.

The facts appear to be these: While the above-named vessel was lying in Galveston harbor, a quarrel arose on board

Merchant Vessels—Jurisdiction.

thereof between the two mates and the cook, which resulted in the beating of the latter by the former. The cook made complaint to the justice of the peace above referred to, charging the mates with assault and battery. The accused were brought before the justice, a trial was had, they were convicted, and were each fined \$5.

The general rule of law is that, except under some treaty stipulation otherwise providing, a merchant vessel has no exemption from the territorial jurisdiction of the harbor or port in which the same is lying; and it is assumed that the justice had cognizance of the complaint in this case, and that the proceedings before him are not open to objection, unless the jurisdiction of the local authorities was taken away by the following provision in article 13 of the treaty with Sweden and Norway of 1827, viz :

“The consuls, vice-consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captains should disturb the order or tranquillity of the country, or the said consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported.”

The only right which, by the terms of the above provision, is granted to consuls, vice-consuls, &c., is the right “to sit as judges and arbitrators in such *differences* as may arise *between the captains and crews;*” and the recipients of the right may, in order “to cause their decision to be carried into effect or supported,” demand the assistance of the local authorities. This right would seem to be limited to the determination or arbitrament of disputes and controversies of a civil nature, and not to extend to the cognizance of offenses. And such, indeed, appears to have been the understanding of Congress, as is shown by the act of August 8, 1846, chap. 105, which was designed for the more effectual enforcement of the provision. That act, after setting out the provision in a preamble, proceeds to confer upon the district and circuit courts of

Merchant Vessels—Jurisdiction.

the United States, and United States commissioners, authority to issue, upon the application of the consul, all proper remedial process, mesne and final, to carry into full effect the "award, arbitration, or decree" of such consul, and to enforce obedience thereto by imprisonment, &c. The language of the act is plainly inapplicable to any judgment or sentence pronounced by the consul against one of the officers or crew of a vessel for an offense; indicating that Congress did not regard the provision in the treaty as imparting to him any criminal jurisdiction whatever.

On the other hand, if the conduct of the captains or of the crew, where differences arise between them, is such as to "disturb the order or tranquillity of the country," the right of the local authorities to interfere, in the exercise of their police and jurisdictional functions, is distinctly reserved by the above-mentioned provision. This reservation, taken strictly, includes all acts on the part of the captains and crews, as against each other, amounting to actual breaches of the public peace; and in this sense it may, perhaps, cover the case under consideration.

In the jurisprudence of some countries, especially of France, the general rule of law already adverted to is so far relaxed in practice as that all acts relating to the interior discipline of the vessel, and even all offenses committed on board by one of the crew against another which do not affect the tranquillity of the port, are excluded from the local jurisdiction—all such matters being left to the cognizance and disposal of the consul, and the local authorities being authorized to interfere only when their aid or protection is formally required by him. And by some jurists this doctrine is laid down as a rule of international law, which operates in default of treaty stipulations. But though that view does not generally prevail, and the practice about to be stated proceeds on a contrary view, the same doctrine has, to a greater or less degree, been formally introduced into nearly all modern commercial treaties between nations engaged in maritime commerce. See, for example, the eighth article of our treaty with France of February 23, 1853; the thirteenth article of our treaty with the German Empire of December 11, 1871; and the eleventh article of our treaty with Italy of February 8, 1868. The

Merchant Vessels—Jurisdiction.

feature common to these articles is, that besides the cognizance of differences that may arise between the officers and crew the consul is to have "charge of the internal order" of the vessel, to the exclusion of the local authorities. And by the act of June 11, 1864, chap. 116, providing for their execution, they are described as extending to "controversies, difficulties, or disorders," &c.; and authority is given to any judge of a United States court and to any United States commissioner, upon application of the consul as there provided, to cause the person complained of to be brought before such judge or commissioner for examination, and if he shall find "a sufficient *prima facie* case that the matter concerns only the internal order and discipline of such foreign ship or vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States," he is required to commit the accused, &c. Thus the doctrine above referred to would seem to pervade the last-mentioned treaties, and to be recognized by Congress, so far at least as it respects acts and offenses that affect the internal order and discipline of the vessel, and which do not disturb the peace of the port.

If the provision in the treaty with Sweden and Norway, quoted above, be interpreted as in effect conferring the same powers upon the consul as are imparted by the other treaties cited, the jurisdiction of the justice in the present case would seem to depend upon whether the offense complained of was of a nature to affect only the interior discipline of the vessel and whether it did or did not disturb the public peace. Here, however, the information furnished is so meager as to lead to nothing definite or satisfactory on that point. In the absence of evidence to the contrary, it is fair to presume that the justice has not exceeded his jurisdiction.

I will observe, in conclusion, that in my opinion the view of the United States district judge for the eastern district of Texas, as stated in his accompanying letter, touching his jurisdiction in the *habeas corpus* case mentioned by him, is erroneous. By virtue of section 753 of the Revised Statutes, the writ extends to any one who is in custody in violation of a treaty of the United States; and if, at the hearing, it should

Railroad Mail Transportation.

appear that the party is imprisoned in violation of a treaty, he may and ought to be discharged. The case to which the district judge refers involved the question whether the commitment violated a treaty; a question over which he undoubtedly had jurisdiction under the above-named section.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. HAMILTON FISH,
Secretary of State.

RAILROAD MAIL TRANSPORTATION.

The provision in the act of July 12, 1876, chap. 179, directing the Postmaster-General to make a 10 per cent. reduction of the compensation to railroad companies for carrying the mails, operates prospectively, and does not affect existing contracts which were authorized by the law in force at the time of their execution. As to these, the rate remains as stipulated during the period fixed by the agreement.

DEPARTMENT OF JUSTICE,
December 21, 1876.

SIR: A reply to yours of October 25, 1876, has been delayed by the pressure of litigated cases requiring constant and instant attention. You inquire whether or not the act of July 12, 1876, which directed the Postmaster-General to make a 10 per cent. reduction of the compensation of *all* railroad companies for carrying the mails, applies to those corporations with which the Postmaster-General had made contracts for a term of years not yet elapsed.

In my opinion, Congress did *not* intend it to have this effect. The contracts, of which that with the Chicago and Northwestern Railway Company, submitted by you for inspection, is a sample, were authorized by the law in force at the dates of their execution. They bound both parties. A breach of them by either would subject the delinquent to a claim for damages. The act of July 12, 1876, was apparently passed with a view to reduce the public expenses. But it would not have this effect if an equivalent to the reduction of pay were recoverable under the name of damages, with perhaps the expenses of litigation added. Therefore I conclude that the construction most consistent with justice and fair

Improvement of South Pass of the Mississippi.

dealing is the true one, viz: that, as to existing contracts, the rate remains as stipulated in the agreement during the term therein mentioned, but that in those cases where no contract prevented the reduction should be made. The Postmaster-General was directed to so reduce the compensation in every instance where he was at liberty consistently with previously existing laws and contracts, and upon any renewals of written agreements, as from time to time their terms expired. Every law is presumed to be prospective in its operation unless the contrary *clearly* appears; and thus only can the act of July 12, 1876, be made to operate prospectively, in the legal meaning of that word.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

The POSTMASTER GENERAL.

IMPROVEMENT OF SOUTH PASS OF THE MISSISSIPPI.

The conditions imposed by the second *proviso* in section 4 of the act of March 3, 1875, chap. 134, viz, "unless the said Eads and his associates shall secure a navigable depth of 20 feet of water *through said pass* within thirty months," &c., and "unless the said Eads and his associates shall secure an additional depth of not less than two feet during each succeeding year thereafter until 26 feet shall have been secured," &c., operate to bind Eads and his associates, on pain of forfeiture of their privileges, &c., to secure a navigable depth of 20, 22, 24, and 26 feet, within the periods designated, through the channel over the shoal at the head of the pass and likewise over the bar at its mouth; and, by necessary implication, also to secure a navigable width of the required depth.

The provisions in other parts of said act requiring specific depths and widths, varying from 20 feet in depth by 200 feet in width to 30 feet in depth by 350 feet in width, relate solely to the work at the mouth of the pass.

So soon as the depth and width required by those provisions for payment of any installment are obtained, the payment of such installment may then be made, if no forfeiture has been incurred under the conditions contained in said *proviso*.

DEPARTMENT OF JUSTICE,

January 17, 1877.

SIR: Your communication of the 24th of November last, in relation to the improvement of the South Pass of the Mississippi River, undertaken by James B. Eads and his associ-

Improvement of South Pass of the Mississippi.

ates under the provisions of the act of March 3, 1875, chap. 134, presents for my consideration the question, "Whether the shoal at the head of the pass is a part of the pass or of the main Mississippi River, and whether the first payment of \$500,000 can be made when the channel at *the mouth of the pass* is 20 feet deep and 200 feet wide, or whether the same width and depth of channel must be obtained through the shoal at *the head of the pass?*"

The first branch of the question, viz, as to whether the shoal at the head of the pass is a part of the latter, involves the determination of what is purely matter of fact, and for that reason it does not fall within my sphere of duty to investigate the same or give an opinion thereon. But I observe that the commission of United States engineer officers, who were appointed by Special Orders No. 229, dated November 2, 1876, to report upon that and other subjects, declare in their report to the Secretary of War of November 19, 1876, that "the channel through the said shoal by which access has been had or is to be had in future from the river above into the South Pass is a part of that pass." This, moreover, accords with what would seem to have been the understanding of Congress when the above-mentioned act was passed; for the design of the improvement thereby authorized undoubtedly is to secure a navigable outlet from the deep water of the river above the pass to the deep water of the Gulf below it, which cannot be accomplished without removing the obstruction presented by the shallowness of the channel through the said shoal. Assuming, then, that the channel through the shoal at the head of the pass is itself to be regarded as a part of the pass under the act, I proceed to the remainder of the question under consideration.

The act provides that "when a channel of 20 feet in depth and of not less than 200 feet in width shall have been obtained by the action of said jetties and auxiliary works \$500,000 shall be paid;" and the point is, whether this requirement as to depth and width of channel before payment applies solely to the work on the bar at the mouth of the pass, or whether it also extends to that on the shoals at the head of the pass.

Eads and his associates are authorized by the act to con-

Improvement of South Pass of the Mississippi.

tract, on the conditions therin mentioned, such permanent and sufficient jetties and such auxiliary works as are necessary to create and maintain, as therein set forth, "a wide and deep channel *between the South Pass of the Mississippi and the Gulf of Mexico.*" This language plainly locates the work of constructing the channel at the bar formed in the mouth of the pass; and, but for the terms of one of the conditions imposed by way of a proviso, there is nothing in the act that can well be taken to include, as within the contemplated improvement, the deepening of the channel elsewhere. The condition referred to provides, that unless "*a navigable depth* of 20 feet of water through said pass" shall be secured within thirty months after the date of the act, Congress may revoke the privileges granted by the act and cancel the obligations of the United States. It also requires that, after a depth of 20 feet of water is obtained, an additional depth of 2 feet each succeeding year thereafter shall be secured until the depth of 26 feet is obtained, on pain of like action by Congress. By force of the words "*through said pass,*" the channel over the shoal at the head of the pass is brought within the limits of the improvement. But whilst the extension of the improvement so as to embrace the channel over that shoal depends entirely upon the condition mentioned, the deepening of such channel seems likewise to be governed wholly by the requirements of the same condition. These are, as already stated, that the channel shall have a navigable depth of 20 feet by a certain time, and annually thereafter an additional depth of 2 feet, until *a navigable depth of 26 feet* is secured. Here, it will be observed, no specific width is designated; yet *a navigable width* of the required depth is clearly implied.

On the other hand, the construction of the "wide and deep channel between" the pass and the Gulf appears to be mainly controlled by requirements contained in other parts of the act, which I will presently mention. I say mainly controlled, for it is true that the terms of the condition above adverted to, requiring a navigable depth of 20, 22, 24, and 26 feet within certain periods, apply as well to this portion of the work as to that at the head of the pass; yet the requirements referred to as contained in other parts of the act,

Improvement of South Pass of the Mississippi.

touching the depth and width of the channel, seem to have special reference to the former. They provide that the channel shall ultimately be 30 feet deep and 350 feet wide; whereas the condition calls only for an ultimate navigable depth of 26 feet.

In regard to payment for the work, the act provides that, the conditions therein prescribed being fully complied with, the sum of \$5,250,000 shall be paid "for constructing said works and obtaining a depth of 30 feet in said channel," &c. It then goes on to prescribe the mode of payment, which is by installments, as the work progresses. Thus, when a channel of 20 feet in depth and 200 feet in width is obtained, the sum of \$500,000 is to be paid; and upon obtaining 22 feet in depth and 200 feet in width a like sum is to be paid; and so on to 24 feet in depth by 250 feet in width, 26 feet by 300 feet, 28 feet by 350 feet, and finally 30 feet in depth by 350 feet in width. These installments foot up \$1,250,000, payment of the remaining million being otherwise provided for; and the above requirements as to depth and width relate, I think, exclusively to the "wide and deep channel between" the pass and the Gulf. The act, indeed, makes it obligatory that all the conditions prescribed (including, of course, the condition requiring a navigable depth of 26 feet to be secured over the shoal at the head of the pass) shall be fully performed before full payment is made for the work; but the payment of the installments is governed by the special provisions authorizing such payment.

The general conclusions at which I have arrived upon the subject before me are as follows:

1. That Mr. Eads and his associates are bound by the express terms of the said condition, on the pain of forfeiture of their privileges, &c., to secure a navigable depth of 20, 22, 24, and 26 feet, within the periods therein prescribed, through the channel over the shoal at the head of the pass and likewise over the bar at its mouth; that, by necessary implication, they are also bound to secure a navigable width of the required depth in each instance through the channel at each of those points; and that the provisions in said condition as to depth and width are the only ones of the kind which apply to the said shoal.

Offices of Trust.

2. That the provisions in other parts of the statute requiring specific depths and widths, varying from 20 feet in depth by 200 feet in width to 30 feet in depth by 350 feet in width, relate solely to the work at the mouth of the pass.

3. That the payments of the first and other installments are controlled exclusively by the terms of the particular provisions authorizing such payments; and that, since the specified depths and widths mentioned in these provisions have reference only to the work at the mouth of the pass, so soon as the depth and width required for any such payment are obtained it may then be made, provided no forfeiture has been incurred under said condition.

Accordingly, the answer I make to your question is that the first installment of \$500,000 can be made when the channel at the mouth of the pass is 20 feet deep and 200 feet wide, although the same depth be not obtained through the shoal at the head of the pass, if no forfeiture shall have arisen by action of Congress or without action of Congress, as provided in the condition mentioned.

I have the honor to be, very respectfully,

ALPHONSO TAFT.

Hon. J. D. CAMERON,

Secretary of War.

OFFICES OF TRUST.

The commissioners appointed by the President for the Centennial Exhibition, under section 3 of the act of March 3, 1871, chap. 105, though charged with duties of a special and temporary character, are officers of the United States.

The positions held by them are offices of "trust," within the meaning of section 9, article 1, of the Constitution.

DEPARTMENT OF JUSTICE,

January 20, 1877.

SIR: I have considered the question presented in your letter of the 11th of November last, namely, whether the provision in the ninth section of Article I of the Constitution of the United States, that "no person holding any office of profit or trust under them (the United States) shall, without the consent of the Congress, accept any present, emolument, office, or

Offices of Trust.

title, of any kind whatever, from any king, prince, or foreign state," applies to persons holding the positions of president of the Centennial Commission, director-general of the Centennial Exhibition, and secretary of the executive committee of said commission.

The first two of those positions, it appears, are held by persons, each of whom also holds an appointment from the President of the United States as a commissioner under the third section of the act of March 3, 1871, chap. 105, entitled "An act to provide for celebrating the one-hundredth anniversary of American Independence," &c., whilst the remaining position is held by a person who does not, as I understand, otherwise sustain any official relation to the Government.

The commissioners appointed under the above-mentioned act are charged, as a commission, with certain duties, which are defined in the second and sixth sections of the same act and also in the subsequent act of June 1, 1872, chap. 259. The Government being interested in the performance of these duties, they constitute a public charge or office, and those on whom they devolve are, strictly speaking, public officers. In section 7 of the said act of March 3, 1871, the commissioners, as it would seem, are comprehended under the term "officers" there employed; and I entertain no doubt that, though their duties are of a special and temporary character, they may properly be called officers of the United States during the continuance of their official functions.

However, as the commissioners receive no compensation for their services, the positions held by them are not offices of profit. Are they offices of trust, within the meaning of the constitutional provision? I think they must be so regarded. Even if the expression "office of trust" be taken in its strict common law signification, it would unquestionably include an office whose duties are of the character described in the statutory provisions referred to above; the persons appointed to discharge such duties being presumed to have been intrusted therewith on account of their personal qualifications and fitness for the place.

I infer that the secretary of the executive committee holds his appointment, not from the President or any of the Departments of the Government invested with the appointing power,

Compensation of Assistant U. S. Attorney.

but from the Commission itself, by which his place is presumed to have been created. If this be true, then, although he may be an officer of that body, he does not thereby become an officer of the United States, and cannot be considered as such.

Upon the whole, I am of the opinion that the provision in the Constitution quoted above applies to the persons holding the positions of president of the Centennial Commission and director-general of the Centennial Exhibition, but not to the person holding the position of secretary of the executive committee of said Commission.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. HAMILTON FISH,
Secretary of State.

COMPENSATION OF ASSISTANT U. S. ATTORNEY.

An assistant United States attorney was appointed in 1874, at the request of the Postmaster-General, to aid in conducting a suit against a defaulting postmaster. By the terms of his appointment the assistant was to receive "a reasonable compensation, to be determined by the Post-Office Department." He claims a fixed amount as compensation, by virtue of an agreement made previous to the appointment: *Held* that whatever the previous agreement was, it has nothing to do with the matter of compensation for services under the appointment, which latter leaves the amount to the future determination of the Post-Office Department—an arrangement wherewith any previous contract for a specific fee is inconsistent.

DEPARTMENT OF JUSTICE,

January 24, 1877.

SIR: I have the honor to return to your Department, herewith, the papers which accompanied a letter received by me from the Hon. J. W. Marshall, Acting Postmaster-General, dated October 17, 1876, in regard to a claim for professional services presented by Mr. Henry W. Hilliard, of Georgia.

It seems that on the 19th of October, 1874, Mr. Hilliard was appointed an assistant United States attorney for the district of Georgia, to aid in conducting a suit against a defaulting

Compensation of Assistant U. S. Attorney.

postmaster. By the terms of his appointment he was to receive for this service "a reasonable compensation, to be determined by the Post-Office Department." The appointment was made at the request of the Postmaster-General, with the understanding that the compensation should be paid out of the appropriation for the service of the Post-Office Department applicable to the payment of "fees to * * * attorneys," &c.

On the 20th of October, 1874, Mr. Hilliard was paid \$500 as a "retainer" in the case; and he claims to be entitled to \$500 more, alleging that the Postmaster-General had agreed to give him a fee of \$1,000, of which the sum paid on the 20th of October was a part.

There is no evidence with the papers of any agreement between him and the Postmaster-General, except the letters of Mr. Spence and Mr. Martin. Mr. Spence relates the substance of a conversation with the Postmaster-General, in which the latter said "that he *would request* the Attorney-General to appoint Mr. Hilliard," and that "he *had agreed* to pay him \$1,000; \$500 of which was to be paid immediately, and the balance at the close of the trial." Mr. Martin states that his recollection of the fee Mr. Hilliard was to receive was "\$500 as a retainer and \$500 at the termination of the case." But it will be observed that the conversation to which Mr. Spence refers happened before the appointment of Mr. Hilliard by the Attorney-General, and applies to an agreement then already made; while the statement of Mr. Martin, for aught that appears therein, *may relate* to the same agreement. Whatever the agreement was previous to the appointment, it has nothing to do with the matter of compensation for services under the appointment. The latter provides a special mode for determining *that*; it leaves the amount, which must be a reasonable one, to the future determination of the Post-Office Department—an arrangement wherewith any previous contract for a specific fee is inconsistent.

If, then, a "reasonable compensation" for the services has already been determined by your Department, and the amount thereof paid to Mr. Hilliard, he has got all that he has any right to claim, though the amount falls short of that which the alleged agreement calls for; if it has not as yet been

Use of the Hunter Stamp.

determined, what further sum, if any, he should be allowed, rests with you to fix according to your own judgment.

I am, sir, very respectfully,

ALPHONSO TAFT.

Hon. J. N. TYNER,

Postmaster-General.

USE OF THE HUNTER STAMP.

Sections 3445 and 3446 Rev. Stat. give the Secretary of the Treasury and the Commissioner of Internal Revenue power to require and enforce the use of the so-called Hunter stamp upon cigars.

Regulations promulgated under and in conformity with those sections have the force of law; and a failure to comply therewith is punishable under the general clause of section 3456 Rev. Stat.

DEPARTMENT OF JUSTICE,

February 2, 1877.

SIR: Referring to yours of the 19th ultimo, I would say that, in my opinion, the Secretary of the Treasury and the Commissioner of Internal Revenue, under Revised Statutes, sections 3445 and 3446, have power to require and enforce the use of the so-called Hunter stamp upon cigars, being the stamp now in use upon the cigar-box, but with the addition of coupons, one of which is to be placed upon every cigar contained in such stamped box, the stamp and coupon bearing the same numerical figures. The first of the above-named sections (3445) authorizes "such change in stamps" and the prescription of "such instruments or other means of attaching, protecting, and canceling stamps for tobacco, snuff, and cigars" as those officials may approve. The next section (3446) authorizes them to "alter, renew, or change the form, style, and device of any stamp, mark, or label used under any provision of the laws relating to distilled spirits, tobacco, snuff, and cigars, when, in their judgment, necessary for the collection of revenue tax, or the prevention or detection of frauds thereon; and may make and publish such regulations for the use of such mark, stamp, or label as they find requisite. But in no case shall such renewal or change extend to the abandonment of the general character of the stamps above mentioned, nor to the dispensing with any provisions requir-

Accounting Officers—Effect of Settlements by.

ing that such stamps shall be kept in book form and have thereon the signatures of revenue officers."

It will be noticed that the phraseology employed contemplates the possible use of some mark or label in addition to the stamp itself; and that any change, while it preserves the general character of the stamps, the book form, and official signature, is authorized. The regulations promulgated under and in conformity with these sections would have the force of law; and any failure to comply with them on the part of the vendor of cigars would make him punishable under the general clause of Revised Statutes, section 3456, imposing a penalty and forfeiture for omitting to do anything required by law in the conduct of this business, even if he would not become amenable to more specific provisions.

Very respectfully, your obedient servant,

ALPHONSO TAFT.

Hon. LOT M. MORRILL,

Secretary of the Treasury.

ACCOUNTING OFFICERS—EFFECT OF SETTLEMENTS BY.

Section 191 of the Revised Statutes is limited to cases where *balances are* found upon the settlement of accounts or claims, and certificates thereof are transmitted to the head of the proper Department for his warrant or requisition; it does not extend to any case where no balance is certified, or where the whole account or claim is disallowed.

The prohibition in that section against changing or modifying balances certified by the Commissioner of Customs and the Comptrollers of the Treasury does not apply to these officers.

The provision making their findings "conclusive upon the executive branch of the Government" signifies only that such findings are not to be revisable by any other officer or officers of that branch of the Government.

Whether the Comptrollers and Commissioner are authorized to *reopen* settlements made by themselves or their predecessors in office depends upon considerations founded on the law as it stands independently of the said section; *its* provisions have no bearing on this subject.

DEPARTMENT OF JUSTICE,

February 7, 1877.

SIR: I have considered the questions submitted in your letter of December, 27, 1876, viz:

"1. Does the prohibition in section 191 of the Revised Stat-

Accounting Officers—Effect of Settlements by.

utes, upon heads of Departments, against changing or modifying the settlement of public accounts, apply as well to the Commissioner of Customs and Comptrollers of the Treasury as to the Secretary of the Treasury or other head of a Department, and can a Comptroller of the Treasury reopen and change or modify the settlement of a public account made by himself or his predecessor?"

"2. Can a Comptroller of the Treasury reopen and re-examine such settlement upon the discovery and presentation of new and material evidence?

"3. Conceding that said section 191 prohibits the change or modification by the head of a Department of a balance certified upon the settlement of a public account, and makes such settlement conclusive upon the executive branch of the Government, and subject to revision only by Congress or the proper courts, does such prohibition apply in cases where no balance is certified and the whole account is rejected?"

These questions are understood to be propounded with a view to ascertain whether, in the opinion of the Attorney-General, the reopening and re-examination, by the accounting officers of the Treasury, of an account once passed upon by them, are forbidden by the above-named section; and my investigations into the authority of those officers, relative to the reopening and re-examination of settlements, have consequently been limited to the ascertainment of whether it is prohibited by that section, which reads as follows:

"SEC. 191. The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioner of Customs or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts. The head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided."

The provision just quoted is to be viewed in connection

Accounting Officers—Effect of Settlements by.

with other provisions of the Revised Statutes which stand *in pari materia*. Of this sort are those contained in sections 269, 273, 277, 313, and 317. Section 277 prescribes the duties, in general, of the several Auditors, touching the settlement of accounts; section 269, 273, and 317, those of the Comptrollers and Commissioner of Customs; and section 313 those of the Register.

By section 277 it is made the duty of the First Auditor to receive and examine various kinds of accounts. In regard to some of these he is required, after examination, to certify the balances and transmit the same with the vouchers and certificates to the Commissioner of Customs, and in regard to the rest he is to certify the balances and transmit them in like manner to the First Comptroller, for their decision thereon respectively.

The same section makes it the duty of the Second and Third Auditors to receive and examine various other kinds of accounts, including all war accounts. These officers, after examination of the accounts referable to them, are required to certify the balances, and transmit the same, with the vouchers and certificates, to the Second Comptroller for his decision thereon.

This statement of the provisions of section 277 will suffice for the present purpose, and, accordingly, so much of that section as relates to other Auditors is passed over.

By sections 269 and 317 it is made the duty of the First Comptroller and of the Commissioner of Customs to examine all accounts settled by the First Auditor, and to certify the balances arising thereon to the Register, who, by section 313, is required to receive from those officers the accounts adjusted by them, to preserve such accounts with their vouchers and certificates, and to transmit to the Secretary of the Treasury copies of the certificates of balances of such accounts.

Section 273 makes it the duty of the Second Comptroller "to examine all accounts of the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred."

With the provisions just referred to concerning the duties of the Auditors, Comptrollers, &c., should be construed section

Accounting Officers—Effect of Settlements by.

(~~Sec. 191~~)
191. It reads: "The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioners of Customs or the Comptrollers of the Treasury, upon the settlement of public accounts"—meaning, very plainly, the balances certified by the First Comptroller and Commissioner of Customs, and also those certified by the Second Comptroller, in pursuance of the above-mentioned provisions. The certificates of balances made by the First Comptroller and Commissioner under those provisions are not directed to the head of a Department; they are directed to the Register, by whom copies thereof are transmitted to the Secretary of the Treasury; but they are manifestly within the intent of the provisions. However, the certificates of balances made by the Second Comptroller are directed to the head of the Department "in which the expenditure has been incurred;" so that if the settlement upon which a certificate of the Second Comptroller is based relates to a war account, such certificate is directed to the Secretary of War. Those balances (section 191 goes on to provide) "shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts." The words "heads of Departments," as here used, obviously signify the heads to whom the balances are certified as aforesaid; thus, in the case of a balance certified by the Second Comptroller upon the settlement of a war account, the Secretary of War is meant. This is clear, moreover, from the next sentence in the section, which stands in conjunction with the preceding sentence as a qualifying appendage thereto, and which reads as follows: "The head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance," &c. I will here observe that the term "warrant," as employed in this sentence, comprehends as well the *requisitions* of the Secretary of War, or of the Secretary of the Navy, or other head of Department for balances so certified to him, as the *warrants* of the Secretary of the Treasury for balances shown by the certificates of the First Comptroller and Commissioner of Customs, copies of which are sent to

Accounting Officers—Effect of Settlements by.

him by the Register. The words "warrant" and "requisition" are sometimes used with the same meaning. For example, the "*warrants* drawn by the Secretaries" of the War and Navy Departments, mentioned in section 273, signify precisely the same thing as the "*requisitions* of the Secretaries of those Departments," mentioned in section 3673.

Accordingly, in so far as section 191 applies to the heads of Departments, the legal effect produced thereby is simply this: It prohibits the Secretary of the Treasury from changing or modifying the balances appearing upon the certificates of the First Comptroller and Commissioner of Customs, whereof copies have been transmitted to him by the Register; it prohibits the Secretary of War from changing or modifying the balances certified to him by the Second Comptroller; and so with respect to other heads of Departments to whom balances may be certified by the Comptroller. But it authorizes the Secretary of the Treasury, where balances are certified by the First Comptroller and Commissioner, upon the transmission of copies of the certificates to him of the Register, and before issuing a warrant for any of such balances, to submit any *facts* in his judgment affecting the correctness of the balance to the Comptroller or the Commissioner, as the case may be; and the decision of the Comptroller or Commissioner thereon is to be "final and conclusive," as far as the executive branch of the Government is concerned. So where a balance is certified by the Second Comptroller to the Secretary of War, it authorizes the latter, before issuing a requisition for such balance, to submit any facts which in his judgment affect the correctness of the balance to the Second Comptroller, whose decision thereon is, in like manner, to be final and conclusive. And so with the other heads of Departments.)

Now, the results of settlements of public accounts are not certified to the heads of Departments, except where balances are found for which warrants or requisitions are to be issued drawing money from the Treasury—a fact that is plainly assumed in the last sentence of section 191. Thus, if an account passed upon by the First Comptroller or the Commissioner of Customs, or a claim examined by either of them, be found balanced or be rejected, the action of each is evidenced

Accounting Officers—Effect of Settlements by.

in the usual way, and goes with the vouchers, &c., to the Register for preservation; but no copy of the instrument showing such action is sent by the latter officer to the Secretary of the Treasury. So, if a war account or claim be found balanced or be disallowed by the Second Comptroller, no certificate exhibiting such result is sent by him to the Secretary of War. In the cases just put, therefore, that section very clearly has no operation whatever; it being by the terms thereof limited in its application to *balances* which arise upon the settlement of public accounts, and of which certificates are transmitted to the head of the proper Department for his warrant or requisition.

Agreeably to this view of the subject, I must answer (varying the order of the questions submitted) your third question in the negative. The prohibition of section 191 cannot, in my opinion, have any application to cases where no balance is certified and the whole account is rejected, such cases being entirely without its scope.

That prohibition, as I have already stated, forbids the head of a Department to change or to modify any balance certified to him, but empowers him to submit to the Comptroller, before signing a warrant or requisition for such balance, any facts which in his judgment affect its correctness. In default of any facts for submission the balance is to be "conclusive upon the executive branch of the Government," and subject to revision only by Congress or the proper courts. And in this connection your first question suggests the inquiry whether the same prohibition extends to the Commissioner of Customs and Comptroller of the Treasury.

That these officers may review their previous action in the light of facts presented to them by the Secretary, before he issues his warrant or requisition, is clear. The power to do so upon new and material facts affecting the correctness of such action, which may otherwise come into their possession before or even after the issue of a warrant, but prior to payment, is not, as I conceive, inconsistent with the provisions of section 191. Until the balance found upon a settlement has been actually paid, and while the matter is, as it were, *in fieri*, I think the Comptrollers or Commissioner may, notwithstanding the provisions of that section, interpose at any stage of

Accounting Officers—Effect of Settlements by.

the proceedings to prevent the payment of the balance, recall the certificate, and re-examine the settlement, with a view to the correction of errors or mistakes, whether of law or fact, therein. The design of those provisions was certainty not to cut off this wholesome power of review by the accounting officers over their own actions, when exercised within those limits and for that purpose; for without it great inconvenience and often great loss to the Government might ensue. Their aim was to exclude from the heads of Departments all revisory authority over the findings of the Comptrollers and the Commissioner as shown by the certificates of balances, (except so much as might be necessary to determine whether the correctness of any balance is affected by facts coming to the knowledge of the head of Department,) and to make such findings conclusive. The latter (so the statute declares) are to be "conclusive upon the executive branch of the Government"; by which is meant nothing more than this, that they are not to be revisable by any other officer or officers of the executive Department.

I think, then, that the prohibition mentioned does not apply to the Comptrollers or the Commissioner of Customs.

Hence, whether one of these officers can "reopen and change or modify the settlement of a public account made by himself or his predecessor," as is propounded in your first question, or whether he can "reopen and re-examine such settlement upon the discovery and presentation of new and material evidence," as is asked in your second question, must depend altogether upon considerations founded on the law as it exists independent of the provisions of section 191. Those provisions, it seems to me, have no bearing upon the subject.

I express here no opinion upon the powers of the Comptrollers and Commissioner in that regard beyond what I have incidentally expressed in the foregoing, understanding, as I do, that the questions submitted by you were intended to elicit an opinion only as to the effect of section 191 thereon; and upon this point I trust the views which I have now the honor to communicate to you will be regarded as a sufficient answer.

I am, sir, very respectfully, your obedient servant,
ALPHONSO TAFT.

The SECRETARY OF THE TREASURY.

Retired List—Resection of Arm or Leg.

RETIRED LIST—RESECTION OF ARM OR LEG.

A partial resection of an arm or leg on account of wounds received in battle, where the operation is followed by permanent disability of the limb, and the disability is partly owing to such operation, suffices to bring a case within the *proviso* of the second section of the act of March 3, 1875, chap. 178.

DEPARTMENT OF JUSTICE,

February 13, 1877.

SIR: Your communication of the 15th of November last, in relation to the case of First Lieut. Paul Quirk, Second Cavalry, presents the question, "Whether a *partial resection*" [such as is described in that communication] "on account of wounds, to which operation the permanent disability of a leg may be partly owing, is enough to bring an officer within the *proviso* of the act of March 3, 1875, (18 Stat., 512)?"

You state that Lieutenant Quirk "was placed upon the retired list with the rank of captain, he having been exercising the command of a captain when wounded. After the passage of the above-mentioned act he was reduced to the rank of first lieutenant, the disability for which he was retired involving a partial resection only. From this reduction he desires to be relieved."

And after giving an abstract of the reports of different surgeons, both in and out of the Army, upon the case of Lieutenant Quirk, made at different times, from September, 1863, to May 5, 1876, you further request an opinion as to whether, upon the facts thus set forth, that officer "is entitled to a rescission of the order by which, under the supposed application to his case of the act of March 3, 1875, he was reduced in rank upon the retired list."

To the inquiry first above mentioned I answer, that where there has been but a partial resection of an arm or leg on account of wounds received in battle, if the operation is followed by permanent disability of the limb, and the disability is partly owing to such operation, this is, in my opinion, sufficient to bring the case within the *proviso* of the act of March 3, 1875, referred to in your question.

The other question on which you request an opinion turns upon whether Lieutenant Quirk's case is one of permanent

Paintings on Glass—Duty on.

disability of a limb, partly owing to a partial resection thereof. In regard to this point, permit me briefly to say that the facts set forth in your communication leave no doubt in my mind that his case is one of that sort, and that, consequently, he is fairly entitled to a rescission of the order adverted to.

Very respectfully, your obedient servant,
ALPHONSO TAFT.

Hon. J. D. CAMERON,
Secretary of War.

PAINTINGS ON GLASS—DUTY ON.

Paintings on glass, which rank as works of art, are subject to a duty of 10 per centum ad valorem under section 2504 Rev. Stat., schedule M, as "paintings * * * not otherwise provided for."

Such paintings distinguished from paintings on glass which are the products of manufacture or handicraft. The latter only are dutiable under the provisions in schedule B, of that section, for "paintings on glass or glasses * * * not otherwise provided for."

DEPARTMENT OF JUSTICE,

February 28, 1877.

SIR: I have examined the papers which accompanied your letter of December 13, 1876, and which are returned to you herewith, in relation to the duty upon paintings on glass that rank and may be classified as works of art.

It appears by these papers that in November, 1874, the then Acting Secretary of the Treasury decided that such paintings came within the provision for "paintings * * * not otherwise provided for," in schedule M, section 2504 of the Revised Statutes, and were liable to a duty of *ten* per centum ad valorem; but that in May, 1875, it was decided by the Secretary of the Treasury that such paintings fell under the provision in schedule B, of the same section, imposing a duty of *forty* per centum ad valorem upon "paintings on glass or glasses," and were dutiable at the latter rate.

Application has been made to you in behalf of the trustees of Saint Patrick's Cathedral, New York City, for a reconsideration of the subject; and, in connection therewith, it is alleged that the value of the glass for certain windows ordered for that cathedral does not exceed \$500, while the value of the paintings put upon the glass is \$10,000.

Paintings on Glass—Duty on.

You request an opinion from me upon the question involved, which I understand to be this: Whether paintings on glass, ranking as works of art, are dutiable under the provision in schedule B, or under the provision in schedule M, above referred to.

This question presupposes that there is a known and established difference among paintings on glass between those which do and those which do not rank as works of art; the former, as I conceive, being produced by the individual skill and invention or design of an *artist*, the latter being products of manufacture or mere handicraft, and bearing the stamp of the *artisan* simply. Assuming, then, that such a difference exists in a commercial sense, and that paintings on glass are classified with reference thereto by the usages of trade, I incline to the view that the provision in schedule B extends only to those of the latter description, and that those of the former description fall under the provision in schedule M.

The first of the provisions just mentioned appears in the following paragraph, taken from section 2504 of the Revised Statutes:

"Porcelain and Bohemian glass, glass crystals for watches, glass pebbles for spectacles, not rough; *paintings on glass or glasses*, and all manufactures of glass, or of which glass shall be a component material, *not otherwise provided for*, and all glass bottles or jars filled with sweetmeats or preserves, not otherwise provided for: forty per cent. ad valorem."

Here, the qualifying phrase "not otherwise provided for" must be understood to apply as well to paintings on glass as to manufactures of glass or of which glass is a component material; and it implies the existence of one or more provisions elsewhere, in which such paintings *are* otherwise provided for.

I find three other provisions, exclusive of that in schedule M, wherein *paintings* are provided for, each of which may include paintings on glass, and all of which are contained in section 2505 of the Revised Statutes. They are: (1) "paintings * * * specially imported in good faith for the use of any society or institution incorporated or established for philosophical, educational, scientific, or literary purposes, or encouragement of the fine arts, and not intended for sale;"

Paintings on Glass—Duty on.

(2) "paintings * * * and other works of art, the production of American artists;" and (3) "paintings * * * and other works of art, imported expressly for presentation to national institutions, or to any State, or to any municipal corporation." Each of these provisions exempts from duty the paintings to which it applies; and where paintings on glass are covered by any one of them, as may well happen, such paintings are undoubtedly otherwise provided for within the meaning of the provision in schedule B.

But to the provisions just enumerated may, I think, be added that in schedule M, as otherwise providing for paintings on glass; the latter applying to such as may be classified as works of art.

Judging from the nature of the other articles with which those described as "paintings on glass or glasses" are associated in the provision in schedule B—all of the former being manufactured products or the work of handicraft—it may reasonably be inferred that such paintings were intended to be dutiable under that provision only where they were the products of manufacture or handicraft; particularly as the provision does not, as has been already intimated, cover *all* paintings on glass.

On the other hand, judging from the character of the other articles with which those described as "paintings" are associated in the provision in schedule M—the former comprising works of art alone—it is fair to presume that this provision was more especially designed for paintings which are works of art, irrespective of the material on which they are produced; and there is ground for believing that paintings on glass ranking as works of art, were meant to be dutiable thereunder.

My conclusion, which proceeds on an assumed difference, in a commercial point of view, between paintings on glass which do and paintings on glass which do not rank as works of art, is that paintings of the former kind are subject to duty only under the provision in schedule M.

I am, sir, very respectfully,

ALPHONSO TAFT

Hon. LOT M. MORRILL,

Secretary of the Treasury.

Lottery Circulars.

LOTTERY CIRCULARS.

Under section 3894 Rev. Stat., as amended by section 2 of the act of July 12, 1876, chap. 186, letters or circulars concerning legal as well as those concerning illegal lotteries are authorized to be excluded from the mails.

DEPARTMENT OF JUSTICE,

March 3, 1877.

SIR: The then Acting Postmaster-General, upon the 28th day of October last, submitted an inquiry as to the correctness of the construction placed by your circular of July 20, 1876, upon Rev. Stats., sec. 3894, as amended by act of July 12, 1876, chap. 186, sec. 2.

That your instructions, contained in that circular, were correct in the interpretation and application of that statute, cannot admit of doubt. Section 3894, as it originally read and as it appears in the volume of the Revised Statutes, was this: "No letter or circular concerning *illegal* lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mails;" the next and concluding sentence of the section providing the punishment for any person who shall deposit anything in the mails in violation of this law, or send any such matter to be conveyed by mail. The amendatory act of July 12, 1876, strikes out the word "illegal." "If this language was ambiguous," say the Supreme Court, in relation to the phraseology of the statute under discussion in *United States vs. Fisher*, (2 Cranch, 389,) "all the means recommended by the counsel for the defendants would be resorted to in order to remove the ambiguity. But it appears to the majority of the court to be too explicit to require the application of those principles which are useful in doubtful cases."

Legal lotteries are those established by law, like the Louisiana State Lottery, or the one authorized by the original charter of Washington, and mentioned in *Clark vs. Mayor*, (12 Wheat., 40.) Their circulars were at first not excluded from the mails; but Congress, apprehending that the injury to the public might be the same in the case of legal as in the

Centennial Exhibition.

case of illegal lotteries, amended the law, especially to exclude the circulars of both from the mails. This supervisory power of determining the character of the matter which should be deemed mailable has frequently been exercised.

Having given the subject that consideration which the amount of the pecuniary interest affected and the respect to be shown to corporations sanctioned by State legislation required, I cannot see how Congress could have more explicitly declared a purpose to deprive of mail privileges *all* lottery letters and circulars, without regard to the charter or charters of the lotteries, than it did by striking out the limitation previously found in the word "illegal."

The papers accompanying your letter are herewith returned.
Respectfully,

ALPHONSO TAFT.

Hon. JAS. N. TYNER,
Postmaster-General.

CENTENNIAL EXHIBITION.

The Secretary of the Interior is authorized to apply certain unexpended balances of appropriations to defray certain charges incurred by his Department in connection with the Centennial Exhibition.

DEPARTMENT OF JUSTICE,
March 3, 1877.

SIR: In reply to yours of the 14th ultimo, as to the application of small balances remaining unexpended of appropriations under act of March 3, 1875, to the payment of contingent expenses of the executive Departments, incurred in connection with the Centennial Exhibition, (as permitted by act of May 1, 1876,) I would say that you have the right to direct the surplus of such appropriations as pertain to your Department to be turned over and used to defray charges arising in consequence of the efforts made by the Interior Department in furtherance of the objects of the Centennial Exhibition.

Very respectfully, yours,

ALPHONSO TAFT.

Hon. Z. CHANDLER,
Secretary of the Interior.

Case of the Steamer Jackson.

CASE OF THE STEAMER JACKSON.

In June, 1865, a steamboat was chartered by the Government to run on the Chattahoochee and Appalachicola rivers, the management of the craft being left in charge of the owners. While under charter it was accidentally lost by fire. Held that the boat was not in the military service, within the meaning of section 2 of the act of March 3, 1849, chap. 129, as amended by section 5 of the act of March 3, 1863, chap. 78, and that the United States incurred no liability for the loss.

DEPARTMENT OF JUSTICE,

March 8, 1877.

SIR: Yours of the 26th ultimo, (received at this Department the 3d instant,) relating to payment for the steamer Jackson, has been under consideration, which has led to the conclusion that the original payment for that vessel was not authorized by law for reasons which are equally cogent to prevent any further payment to the present claimants.

The voluminous documents accompanying your letter, and which are herewith returned, present numerous questions which it is not thought unnecessary to discuss, since the correct solution of the single one, whether or not the boat was—under the act of March 3, 1849, chap. 129, sec. 2, as amended by that of March 3, 1863, chap. 78, sec. 5—to be paid for by the Government in case of accidental loss, will determine whether or not any payment on account of the destruction was legally justifiable.

The essential facts, succinctly stated, are that the steamer was chartered June 18, 1865 (after the perils from actual hostilities were substantially over) to run on the Chattahoochee and Appalachicola rivers, "*the owners to pay all the running expenses;*" this agreement leaving the old captain in charge, and having been effected with his agent. Under this engagement, the boat was laden with cotton to be transported from Eufaula and Fort Gaines, Ga., where it was put on board, to Appalachicola, Fla., and there delivered to the United States Treasury agent. At 3 p. m. of June 29, 1865, when within four hours of reaching her destination, she and her cargo were wholly destroyed by fire, originating from some unexplained cause; the vessel being still under the exclusive man-

Case of the Steamer Jackson.

agement of the owners' master, and no Federal officer, civil or military, being then on board.

The charter was a mere contract of affreightment, (*Reed vs. United States*, 11 Wall., 600-603; *United States vs. Russell*, 13 Wall., 623;) consequently the craft was not "in the military service of the United States, within the meaning of the statutes of March 3, 1849, and 1863. (See opinion of the Supreme Court in *Guttman's case*, 9 Court of Claims Rep., 68-71.) The case of *John S. Shaw vs. The United States*, argued and decided at the current term of the Supreme Court, is much stronger against the Government, on the facts, than the present one; yet it was held that the defendants were not liable, and that the vessel should not have been paid for out of the Federal Treasury (see 3 Otto, 235).

Very respectfully, yours,

ALPHONSO TAFT.

The SECRETARY OF THE TREASURY.

OPINIONS
OF
HON. CHARLES DEVENS, OF MASSACHUSETTS.
APPOINTED MARCH 12, 1877.

TEMPORARY APPOINTMENTS BY THE PRESIDENT.

The President has power to fill, by temporary appointment, in a recess of the Senate, a vacancy then existing which occurred during the next preceding session of that body.

DEPARTMENT OF JUSTICE,

March 17, 1877.

SIR: The inquiry submitted in the note of the Secretary of the Treasury to you of the 13th instant, and by you transmitted to me upon the same day, relating to the nominations of collectors of customs, is answered by the opinion of Mr. Evarts, when Attorney-General, (12 Opin., 449,) to the effect that the President may fill "all vacancies that happen to exist at a time when the Senate cannot be consulted as to filling them," with this limitation: that, according to the tenure of office act, (approved March 3, 1867, chap. 154, 14 Stats., 430, and Rev. Stat. sec. 1769,) if no appointment be made during the session of the Senate held next after the vacancy occurs, the vacated office shall fall into abeyance. The matter is fully discussed by Mr. Evarts, and he is so well sustained by the earlier opinions to which he refers that no further elaboration is deemed necessary.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

NOTE.—In an opinion addressed to the Secretary of the Treasury, dated June 18, 1880, the question of the power of the President to fill a vacancy during a recess of the Senate, which occurred during the preceding session thereof, was again considered by Attorney-General Devens, who, in this later opinion, after an elaborate review of those of his predecessors, and the concurrent practice of the Executive, upon the same subject, accompanied by an able discussion of the subject himself, reaffirms the ruling adopted in the foregoing.

Acts of Former Administration.

ACTS OF FORMER ADMINISTRATION.

Where application was made to the Secretary of the Interior for a review of the action of his predecessor in office and of the Executive in a case passed upon by them during the preceding administration—the application resting solely upon the ground of alleged error in the construction of a statute: *Advised* that the former action in the case cannot with propriety be reviewed.

It is a settled rule of administrative practice that the official acts of a previous administration are to be considered by its successor as final, so far as the Executive is concerned.

DEPARTMENT OF JUSTICE,

March 20, 1877.

SIR: I have the honor to return to your Department, herewith, a number of papers relating to the case of Col. William Craig, a "derivative claimant" of part of the Las Animas grant, which were left with me on Saturday last by Mr. Marble, who, agreeably to your direction, at the same time submitted to me the question whether the action of your predecessor in office and of the late Executive, in regard to that case, may now be reviewed.

In reply to this inquiry permit me briefly to state: The application for a review is not, as I understand, based upon new evidence, or like ground, affecting the *case* itself—indeed, there appears to have been no controversy as to the facts—but it rests entirely upon alleged error in the decisions of the late administration in the construction of a statute. Under these circumstances, I think the former action on the case cannot with propriety be reviewed. It is forbidden by a rule of administrative practice, which was stated and the reason therefor ably presented by Attorney-General Wirt in 1825, (2 Opin., 8,) and which has since been frequently restated with approval by other Attorneys-General, (13 Opin., 33, 387,) viz, that the official acts of a previous administration are to be considered by its successor as final, so far as the Executive is concerned. This rule may be regarded as settled, and I perceive nothing in the present case that relieves the latter from its application.

I am, sir, with great respect, your obedient servant,
CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

Support of the Army.

SUPPORT OF THE ARMY.

Congress adjourned March 3, 1877, without providing for the payment of the Army subsequent to June 30 of that year. Inquiry being made whether, if the necessary funds can be furnished by individual contribution, they can properly be used for that purpose, and the Army thus supported until the next session of Congress: *Advised* (after reviewing the constitutional and legislative provisions bearing on the subject) that this means of paying the Army cannot properly be employed by the President.

Sections 3679 and 3732 Rev. Stat. should be construed together. The latter section authorizes the heads of the War and Navy Departments, in the absence of appropriations, to purchase or contract for clothing, subsistence, forage, fuel, quarters, or transportation, not exceeding the necessities of the current year; such contracts are not within the prohibition of the former section.

DEPARTMENT OF JUSTICE,

March 21, 1877.

SIR: Congress having failed to provide the necessary means for the payment and support of the Army subsequent to June 30, 1877, the inquiry is made whether, if the necessary funds can be furnished by individual contribution, they can properly be used for this purpose, and the Army thus supported until the next session of Congress.

In order to reply to the inquiry, it is necessary briefly to restate the constitutional and legislative provisions immediately bearing upon this subject; and perhaps such restatement will in itself be a sufficient answer to the inquiry.

Article 1, section 9, of the Constitution declares: "No money shall be drawn from the Treasury but in consequence of appropriations made by law." And Congress has from time to time enacted laws to restrain the use of public moneys except for the specific purposes for which they were appropriated, to be used within the times specified, and also to prevent contracting debts in anticipation of appropriations.

Section 3679 of the Revised Statutes provides: "No Department of the Government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations."

Support of the Army.

Section 3732 provides: "No contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which shall not exceed the necessities of the current year."

These sections being construed together, section 3732, as quoted, confers by implication upon the heads of the War and Navy Departments authority, even in the absence of any appropriation, to purchase or contract for clothing, subsistence, forage, fuel, quarters, or transportation, not exceeding the necessities of the current year. Although exceptional and negative in its form, this provision in regard to contracts for clothing, &c., is to be deemed affirmative in its character; and the general provisions of section 3679 does not operate to exclude contracts for the purposes thus enumerated. (*Floyd Acceptances*, 7 Wall., 684.)

Besides these objects of expenditure for the support of the Army, it is necessary that it should be provided with ordnance-ammunition, engineer material and stores, and medical supplies, and that civilian employés should be paid, and the manufacture of arms provided for. For these no authority is given to contract.

In addition (which is perhaps more important than either) the Army itself is to be paid. It is the intention of the law that the pay of the Army should not be in arrear more than two months. (*Rev. Stat.*, sec. 1189.)

If funds should be provided for the pay of the Army and for furnishing the necessary supplies not included within the limited authority to contract which is given to the Secretary of War, it would not be possible to deal with them as public funds. They could not be paid into the Treasury; for, if once so paid, they could not be withdrawn therefrom, no appropriation having been made by law for that purpose. If deposited to the credit of the Secretary of War, or with a private banker, and the officers charged with the payment of the Army were directed to take up these funds upon a special account current, it might be that no liability would be incurred by their bondsmen should they misappropriate the same, as such funds would not be in any sense public funds.

Support of the Army.

(Rev. Stat., sec. 1191.) It may be also that such officers could not be held liable criminally for a wrongful diversion or embezzlement of them, as the United States statutes in reference to such misconduct of officers are intended for the purpose of punishing the crime of misappropriating public funds. (Rev. Stat., sec. 5439; art. 60, Articles of War.) Such payments, so far as enlisted men are concerned, would not properly be payments, but mere assignments of the pay to the disbursing officers; and assignments of their pay by enlisted men are invalid. (Rev. Stat., sec. 2390.)

Even if it be assumed that the funds for the payment of the Army, and the procurement of those necessary supplies for it which cannot be obtained by contract, are to be furnished by voluntary contribution, and that no obligation is to be incurred by the Executive authority that they shall be repaid, the transaction would seem to bear too much the aspect of a contract. It would certainly place the Government, receiving such funds and disbursing them for the necessary purposes of its administration, under the strongest moral obligation to use every proper and reasonable effort that the donors or lenders should be reimbursed by Congress. The transaction would be subject to criticism as an attempt to do indirectly that which Congress should have provided for by positive appropriation.

While the Army is established by general laws and the contracts of the enlisted men extend to five years, so that they are entitled to their pay for the full period of their enlistment, it is expected that Congress will furnish the Executive authority with sufficient appropriations for that purpose. In the absence of such appropriations, I do not think that funds should be sought elsewhere; and am therefore of opinion that provision should be made by Congress itself for the support of the Army after June 30, 1877.

I have not deemed it necessary to enter into some considerations of a more general character in reference to this subject. The maintenance of an army without a legislative appropriation for that purpose would place the executive authorities in a relation to those furnishing the means that it may be done far from desirable.

While by the Constitution the President is made the Com-

Purchase of Land.

mander-in-Chief of the Army, the authority to raise and support armies is given to Congress. (Art. 2, sec. 2; art. 1, sec. 8.)

Very respectfully, your obedient servant,
CHAS. DEVENS.

The PRESIDENT.

PURCHASE OF LAND.

The provision in the act of March 3, 1875, chap. 134, making an appropriation for a movable dam, impliedly authorizes the purchase, with the approval of the Secretary of War, of such land as is necessary for the construction of the dam.

Payment of the purchase money for the land may be made, though the legislature of the State has not consented to the purchase. Section 355 Rev. Stat. considered in connection with section 1838 Rev. Stat. and construed.

DEPARTMENT OF JUSTICE,

March 27, 1877.

SIR: The papers herewith inclosed were transmitted to the Attorney-General by Mr. H. T. Crosby, chief clerk of your Department, (acting for the Secretary of War in his absence,) under cover of a letter dated the 6th of November last, requesting an opinion upon the following questions:

"Does the act approved March 3, 1875, making appropriation for a movable dam, convey by implication or inference the right to purchase land necessary to its erection? If so, can such purchase be made, and, upon the title being declared perfect by the honorable Attorney-General, can payment of the purchase-money be legally made, in the absence of the consent to the purchase by the legislature of the State in which the land or site may be?"

These questions, having been left unanswered by my predecessor in office, their consideration has devolved upon me.

The appropriation in the act of March 3, 1875, referred to, is in these terms:

"That one hundred thousand dollars * * * shall be used for and applied toward the construction of a movable dam, or a dam with adjustable gates, for the purpose of testing substantially the best method of improving permanently

Purchase of Land.

the navigation of the Ohio River and its tributaries; the location of this work, with the plan of construction and the application of the amount hereby appropriated, to be submitted to the Secretary of War for his approval." (18 Stat., 458.)

In my opinion that provision impliedly authorizes the purchase, with the approval of the Secretary of War, of such land as is necessary for the construction of the dam. This view rests upon the well-established rule of interpretation, that whenever a power is given by a statute, every thing necessary to the making of it effectual or requisite to attain the end is implied. (1 Kent's Com., 464.)

The inquiry now is, whether the purchase money for the land may be paid before the legislature of the State shall have consented to the purchase.

Section 355 of the Revised Statutes provides that "No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, * * * until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given." And by section 1838, "The President of the United States is authorized to procure the assent of the legislature of any State, within which any purchase of land has been made for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, without such consent having been obtained."

In the latter of these provisions it appears to be contemplated as something permissible under the existing law that land may be purchased for the Government without the consent of the State thereto being previously given; whilst in the former the prohibition seems to be, not against the expenditure of money for the purchase of land by the Government until such consent is had, but against its expenditure for structures or improvements upon land purchased, *i.e.*, already acquired, by the Government, until the consent is obtained. This agrees with the construction placed by this Department upon the joint resolution of September 11, 1841, which was in force at the time of the adoption of the Revised Statutes, and from which the provision in section 355, quoted

Liability of Sureties on Official Bond.

above, was taken. (See opinion of Attorney-General Bates of May 6, 1861, vol. 10 Opin., p. 35.)

I am, accordingly, of the opinion that, in the case under consideration, payment of the purchase money for the land may be made, though the legislature of the State has not yet consented to the purchase.

I have the honor to be, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,

Secretary of War.

LIABILITY OF SURETIES ON OFFICIAL BOND.

The liability of sureties upon the official bond of a collector of customs is limited to acts done by him during his term of office. They are not responsible for defaults committed in relation to public moneys received by him after the term for which he was appointed.

DEPARTMENT OF JUSTICE,

April 5, 1877.

SIR: I understand the inquiry addressed to me by your note of the 4th instant, taken in connection with the letter of the Commissioner of Customs of the same date which accompanies it, to be whether the sureties upon the bond of a collector of customs continue responsible for defaults committed after the expiration of the four years for which he was appointed, (the bond having been given by him upon his appointment,) so that remittances can be made with safety to such officer after the expiration of the term for which he was appointed.

Whether there is any common law rule by which a public officer appointed for a specific term may hold office beyond that term upon a failure of the proper authority to appoint or elect his successor, has sometimes been deemed a disputed question. The circumstance, however, that Congress has expressly provided that certain officers whose appointments are for a definite term shall hold until their successors are appointed and qualified, affords the strongest ground for construing the United States law as one under which no officer continues to hold his office after the expiration of the term for which he was appointed, unless in the case of those officers

Liability of Sureties on Official Bond.

for whom such provision is expressly made. (14 Opin., 263.) In the case of *The United States vs. Eckford's Executors* (1 How., 250) the court observe, p. 258: "Under the act of 1820, collectors can only be appointed for four years. At the end of this term the office becomes vacant, and must be filled by a new appointment."

The bond which is given with reference to the commission of an officer would seem to be confined in its obligatory force to acts done while that commission had a legal continuance, and could not go beyond it. This would be the natural termination of the liability of the sureties. (9 Wh., 734.)

In *The United States vs. Nicholl*, which was a suit upon the official bond of a Navy agent, the court, in construing the instructions given to the jury, say: "If the second instruction given to the jury was intended to inform them that the defendant, as surety of Swartwout, was not legally responsible for money placed by the Government in his hands after the legal termination of his office, it was unquestionably correct, and this is the sense in which we suppose the court meant to be understood. But if it was intended to convey the idea that he was not responsible for money coming into his hands while in office, but which he afterwards failed to account for and turn over, it was clearly incorrect." (12 Wh., 505.)

In order to charge a surety for the default of an officer it must appear that the public moneys in question came into his hands in point of fact, or in judgment of law, previous to the time when his term of office expires. (*Bryan vs. United States*, 1 Black, 149; *Bruce vs. United States*, 17 How., 442.)

In the hasty examination of the authorities which I have been able to make, as you desired that the question should be answered immediately, I find nothing which runs counter to these authorities.

I am, therefore, of opinion that no remittance should be made to any collector of customs after the expiration of the term for which he was appointed, and that his sureties should not be relied on as responsible for any defaults committed by him in relation to moneys received by him after that time.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Commissioners of the District of Columbia.

COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

The Board of Commissioners of the District of Columbia, under its general executive and administrative authority over the affairs of the District, and its general supervision and direction over the Engineer officer detailed to perform certain duties relating to the "repair and improvement of all streets, avenues, alleys, sewers, roads, and bridges of the District," has power to direct the discharge of the two assistants whom that officer is authorized to appoint, whenever, in its judgment, circumstances make it expedient to determine their employment. The Engineer officer is not authorized to retain these assistants after the board has directed their discharge.

DEPARTMENT OF JUSTICE,

April 6, 1877.

SIR: In answer to the question submitted to me, by your authority, by Lieutenant Hoxie, of the Engineer Corps, I have the honor respectfully to reply:

Mr. Hoxie is an officer of the Engineer Corps of the Army, detailed by yourself, pursuant to the provisions of the third section of the act of June 20, 1874, to perform certain duties therein prescribed. By that section he is given "the control and charge of the work of repair and improvement of all streets, avenues, alleys, sewers, roads, and bridges of the District of Columbia," subject, however, to the general supervision of the Board of Commissioners for the District. By the same section he is authorized to appoint, with the advice and consent of said Board of Commissioners, not more than two assistants, who are to receive a stated salary and be subject to his direction and control.

The inquiry of Mr. Hoxie is, "Whether he has the right, under the law of June 20, 1874, to retain the services of the two assistant engineers whose positions are created by it while, in his own judgment, their services are essential to himself and of value to the District." This question evidently involves another, to wit, whether the Board of Commissioners constituted by the act is invested with power to discharge, or direct the discharge, of one or both of the assistants mentioned.

The second section of the act of 1874 confers upon the said board all the power and authority formerly vested in the gov-

Commissioners of the District of Columbia.

ernor and board of public works of the District, except as thereafter limited; and, under the act of February 21, 1871, the governor was clothed with the executive power and authority over and in said district. The same section also gave to the board special powers, among others authority to apply the taxes or other revenues of the District to the payment of the current expenses thereof, &c.; likewise, authority to abolish any office, to consolidate two or more offices, reduce the number of employés, remove from office, and make appointments to any office authorized by law, &c.

It may be true that the latter authority has reference solely to the officers and employés that belong to the former District government, and that the board does not derive thence any power or authority to discharge the said assistants. The chief executive authority in the District, together with the administration of its revenues, is, however, devolved upon the board. This includes, moreover, the "general supervision and direction of the Engineer officer detailed by the President in the performance of the duties committed to that officer." Although the latter, to enable him to perform these duties efficiently, may appoint two assistants, yet such appointment can only be made with the consent of the board. While, therefore, the intent of the law is to give the officer thus detailed entire freedom in the selection of his assistants, it leaves the expediency of their employment to be determined by the board, in view of the nature and extent of the works in progress, the condition of the District treasury, and other matters proper to be considered in connection with the District affairs. As the question whether the appointment of such assistants should be originally made is one of expediency to be determined by the board, the question whether such assistants shall be continued in service or discharged is one to be decided by them, having regard to similar considerations to those which would influence them in regard to the appointment.

In the absence of any express provision of law, the board, under its general executive and administrative authority over the affairs of the District, and its general supervision and direction over the Engineer officer detailed as aforesaid, may be properly deemed to have power to direct the discharge of

Tax on Capital of Banks and Bankers.

either or both of the assistants, whenever, in its judgment, circumstances make it expedient to determine their employment. This power is fairly within the scope of those more general powers adverted to, which clearly belong to the board.

Agreeably to the foregoing, Mr. Hoxie's question would require the answer that he may retain the two assistants, if, in his judgment, their services are needed, until the Board of Commissioners shall see fit to direct their discharge, but that he is not authorized to retain them longer.

Very respectfully, your obedient servant,
CHAS. DEVENS.

The PRESIDENT.

TAX ON CAPITAL OF BANKS AND BANKERS.

The terms "capital" and "capital employed," as used in paragraph *second* of section 3408 Rev. Stat., include such portion of the capital of any bank, association, company, corporation, or person mentioned therein as is invested in a banking house.

Under that provision every banking association, company, or corporation is taxable for the fixed amount of its capital, and every private banker for the entire capital employed by him in the banking business, *less only* the average amount invested by them respectively in United States bonds.

DEPARTMENT OF JUSTICE,
April 7, 1877.

SIR: Yours of the 28th ultimo propounds this question: "Whether the terms 'capital' and 'capital employed,' as used in paragraph *second* of section 3408 Rev. Stat., embrace that portion of actual capital which is invested in and represented by the banking house or other real estate, or whether, for the purposes of said paragraph, such real estate is not to be regarded and treated as personality?"

So much of the statute as it becomes necessary particularly to examine reads as follows:

"SEC. 3408. There shall be levied, collected, and paid, as hereafter provided: First. * * * Second. A tax of one-twenty-fourth of one per centum each month upon the *capital* of any bank, association, company, corporation, and on the

TAX ON CAPITAL OF BANKS AND BANKERS.

capital employed by any person in the business of banking beyond the average amount invested in United States bonds: *Provided*, That the words '*capital employed*' shall not include money borrowed or received from day to day in the usual course of business from any person not a partner of or interested in the said bank, association, or firm."

You transmitted with your letter a copy of an opinion given November 5, 1869, by special counsel, to the then Commissioner of Internal Revenue, to the effect that the estimated cost or value of the building used for banking purposes (where owned by the banker) should not be considered in determining the amount of "*capital employed*" in that business.

Respect for the careful conclusion of counsel and what is understood to be the practice of the Department has caused a full examination of the subject before expressing any opinion; and a reply to your inquiry has therefore been somewhat delayed, that the response might be the result of due deliberation and investigation.

In my judgment, it is not material whether the capital employed in banking business is invested in real estate or in personality. It is its *use*, and not its nature (if it be not Government bonds), that determines the amount of the tax. As the court in New York observed, "the assessment and taxation of individual bankers, as well as banking associations, in respect of their banking capital, are governed by special statutes, applicable only to property *thus employed*, and not by the general statutes of the State regulating the assessment and taxation of personal property; and the business of banking, whether carried on by individuals or associations, is subject to restrictions and regulations peculiar to itself, and not applicable to any other branch of business." (*Miner vs. Fredonia*, 27 N. Y., 157.)

The imposition is an *excise* duty, as distinguished from a tax strictly so termed; the latter being assessed upon *property* proportionally, while the former is a fixed, direct, and absolute charge for a *privilege*, without any necessary regard to the amount of property belonging to those on whom the charge may fall, (*Oliver vs. Washington Mills*, 11 Allen, 274, 275,) although it may be increased or diminished by the extent to which the privilege is exercised.'

Tax on Capital of Banks and Bankers.

The power of the sovereign to impose a charge upon all professions or avocations is unquestioned. (*Portland Bank vs. Apthorp*, 12 Mass., 257; *United States vs. Vassar and others*, License Tax cases, 5 Wall., 462; *Com. vs. Blackington*, 24 Pick., 357; *Saint Louis vs. Laughlin*, 49 Mo., 562; *State vs. Simmonds*, 12 Mo., 271; *Eyre vs. Jacob*, 14 Grattan, 431.) It has been exercised in the various Federal statutes passed to raise internal revenue. (*Society for Savings vs. Coite*, 6 Wall., 607.)

The section and clause under discussion fixes the charge to be paid for the privilege of carrying on the business of banking. The "capital" fixed by the charter or articles of agreement of a corporation or association, and the "capital employed" by an individual, are taken as the basis for calculating the value of the privilege. They indicate the extent to which the privilege is used; but it is not material in what property that capital is invested, except that the statute, in setting up its arbitrary standard of computation, excludes United States bonds.

In regard to a license fee for carrying on insurance in Illinois, the Supreme Court of that State say: "This is not a tax upon property, but is a burden imposed upon the agent for the right of exercising a franchise or privilege, and which the legislature would have the right to withhold or inhibit altogether, and the amount of premiums charged is merely used as a mode of computing the amount to be paid for the exercise of the privilege. The legislature might have adopted, as a mode of computing the amount, the value of the property insured, and in that event it could hardly be said to be a tax upon that property." (*People vs. Thurber*, 13 Ill., 557.)

The assessment is on the means of acquiring property, and not on the property itself. (*Com. vs. Blackington*, 24 Pick., 357; *In re Peyton*, 7 Hurl. & Nor., 296; *Tyson vs. State*, 28 Md., 587.) Of course, all taxes must be paid out of the payer's property, but excises are not based upon a valuation of property. Thus, an excise upon savings banks, though an indirect assessment upon the depositors, is not a tax upon them or their property, but upon the corporation, on its privilege or franchise. (*Com. vs. People's Savings Bank*, 5 Allen, 432, et seq.)

Tax on Capital of Banks and Bankers.

The amount of capital invested any otherwise than in United States bonds is the statutory method of ascertaining the excisable value of the franchise or privilege. (*Commonwealth vs. Lowell Gas Light Co.*, 12 Allen, 76; *Com. vs. Hamilton Man. Co.*, Id. 301, *et seq.*; affirmed in 6 Wall., 632.)

As expressed in *Coite vs. Society for Savings*, 32 Conn., 188, (affirmed by the United States Supreme Court in *Society for Savings vs. Coite*, 6 Wallace, 594,) the imposition is "for its facilities of business, and not on its assets." (*Attorney-General vs. Bay State Mining Company*, 99 Mass., 152, 153; *Coite vs. Com. Mut. Life Ins. Co.*, 36 Conn. 512.)

The language of the Federal and State courts in those numerous cases, (some of which are above cited,) where the legality of taxes upon corporations which had part of their capitals invested in United States bonds was affirmed, is pertinent here, and apparently decisive of the present inquiry. "It is the capital stock, considered as a franchise, embracing the whole corporate organization, with all its rights and privileges, of which the shares are constituent fractional parts, that forms the subject matter on which the tax or assessment is imposed." (*Com. vs. Ham. Man. Co.*, 12 Allen, 305; *Manufacturers' Ins. Co. vs. Loud*, 99 Mass., 147; *Attorney-General vs. Bay State Min. Co.*, Id., 122, top; *Oliver vs. Liverpool Ins. Co.*, 10 Mass., 538, affirmed in *Liverpool Ins. Co. vs. Massachusetts*, 10 Wall., 566; *Bradley vs. People*, 4 Wall., 459, affirming *Van Allen vs. The Assessors*, 3 Wall., 573; *Bank of Commerce vs. New York City*, 2 Black, 628, 629; *Provident Inst. vs. Massachusetts*, 6 Wall., 611, affirming *Com. vs. Pror. Inst. for Savings*, 12 Allen, 312.)

A banking house purchased and used for banking purposes, either with part of the authorized capital of a corporation or association or the personal funds of a private banker, must be deemed "capital employed" in that business. "The capital employed in manufacturing," said Mr. Justice Weston, in construing a tax act in 1827, "or in a manufacturing establishment, embraces whatever is essential to the prosecution of the business. To this purpose the factory building is as necessary as the machinery or the raw material. As well might it be urged that the money invested in a saw-mill is

Amendments of Revised Statutes.

not capital employed in the manufacturing of boards." (*Gardiner C. and W. Co. vs. Gardiner*, 5 Maine, 139, top.)

It follows, therefore, that every banking corporation should be assessed for the fixed amount of its capital, less the sum put into Government bonds, and the private banker for the capital employed by him in that business, other than that by him invested in such bonds. The statute, which is the sole basis for and guide of any assessment, authorizes no further deductions in ascertaining the sum upon which the monthly tax of one-twenty-fourth of one per cent. is to be calculated.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
• *Secretary of the Treasury.*

AMENDMENTS OF REVISED STATUTES.

The act of February 27, 1877, entitled "An act to perfect the revision of the statutes of the United States," &c., must be deemed to take effect only from its date; there being nothing in its language which expressly, or by necessary implication, gives to it a retrospective operation.

The principle is well settled that statutes are to be construed as operating prospectively only, unless their language clearly and imperatively demands that retrospective effect should be given to them.

DEPARTMENT OF JUSTICE,
April 7, 1877.

SIR: In answer to your letter of the 3d instant, requesting an opinion upon questions submitted by the Paymaster-General in a communication to you dated the 26th ultimo, touching the operation of the act of February 27, 1877, entitled "An act to perfect the revision of the statutes of the United States," &c., I have the honor to reply:

That act provides: "That, for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the 1st day of December, anno Domini one thousand eight hundred and seventy-three,' so as to make the same truly express such laws, the following amendments are hereby made therein." It then specifically declares the amendments, which are very numerous. Some of them are verbal only;

Amendments of Revised Statutes.

others are of great importance, affecting the rights of parties, the duties of public officers, the taxes of the United States, the jurisdiction of courts, and other subjects, and are in their nature alterations of the law as previously declared.

Referring to the purpose of the act, as expressed in the extract quoted as to such purpose, the Paymaster-General asks : "Does the act, as passed, operate to give this purpose effect from its date only, or does it operate to amend the Revised Statutes as of the date thereof in such manner as to give the amendments force and effect for all time subsequent to December 1, 1873, the same as though they had formed part of the Revised Statutes ?"

The question is, therefore, whether the act is intended to act retrospectively, and to take effect from the date of the law which is thereby amended, or prospectively only, taking effect from the date of the amendatory law.

Statutes are to be regarded as operating prospectively only, unless their language clearly and imperatively demands that a retrospective effect should be given to them, so that, unless such effect is given, the proper operation of the statute cannot be secured, and thus the intention that they shall operate retrospectively is necessarily to be implied.

This principle is so well settled that it hardly requires the citation of authorities. I refer, however, to the language of Mr. Justice Miller in the case of *Harvey vs. Tyler* (2 Wall., 346-'7), and to that of Mr. Justice Bradley in *Sohn vs. Watter-son* (17 Wall., 598-'9).

There is nothing in the language of the act under consideration which expressly, or by necessary implication, gives to it a retrospective operation. Some of the amendments, on the contrary, made thereby, plainly indicate that such operation could not have been intended. For instance, the amendment of section 5455, which is an amendment of a penal provision. If a retrospective operation were given to such an amendment, the law would be *ex post facto* in its character, as it increases the offense as originally described in that section. There certainly can be no presumption that Congress intended to disregard the constitutional prohibition against laws of that character. Other instances might also be cited chang-

Use of Metric System in Postal Service.

ing the character of criminal offenses, as before described in the Revised Statutes.

I am, therefore, of opinion that the act of February 27, 1877, must be deemed to operate only from its date. If, upon careful examination, it should be found that any of the amendments are expressly made retrospective, or are so made by reference to former statutes, a different construction might prevail. But in the examination which I have been able to make I have found no amendments of that character.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

USE OF METRIC SYSTEM IN POSTAL SERVICE.

The provision in section 3880 Rev. Stat., declaring fifteen grammes of the metric system to be the equivalent of a half ounce avoirdupois, does not apply to all postal matter. Its application is limited to mail matter between this and foreign countries, on which the rates of postage are determined by weight according to the metric system.

DEPARTMENT OF JUSTICE,
April 11, 1877.

SIR: On the 24th of February last a letter was addressed to the head of this Department by the Postmaster-General, in which he requested an opinion upon the following question: Whether, under the provisions of section 3880 of the Revised Statutes, fifteen grammes of the metric system are to be considered the equivalent of one-half ounce avoirdupois, and so on in progression, for *all* postal purposes, or whether its provisions shall be limited to correspondence between this and foreign countries.

No response to the request having been made by my predecessor, the question submitted has been considered by me, and I now have the honor to state to you briefly my conclusions thereon.

The section mentioned reads thus: "The Postmaster-General shall furnish to the post-offices exchanging mails with foreign countries, and to such other offices as he may deem expedient, postal balances denominated in grammes of the

Use of Metric System in Postal Service.

metric system, fifteen grammes of which shall be the equivalent, for postal purposes, of one-half ounce avoirdupois, and so on in progression."

The inquiry is as to the meaning and effect of the last clause of the section, declaring, "fifteen grammes of which (*i. e.*, of the metric system) shall be the equivalent, for postal purposes, of one-half ounce avoirdupois," &c.

To get at the true interpretation of this clause, it must be viewed in connection with the two preceding clauses in conjunction wherewith it is placed. One of those clauses directs the Postmaster-General to furnish the exchange offices for foreign mails with balances denominated in grammes of the metric system; the other directs him to furnish "such other offices" therewith as he may deem expedient; then follows the clause in question, which is plainly intended to be a postal regulation, not for *all post-offices* throughout the United States, but only for the offices exchanging mails with foreign countries, and for *such other offices* as the Postmaster-General may think it expedient to provide with the said balances. Regarded in this light, the regulation must be construed to apply solely to letters, &c., forwarded by mail to or received by mail from foreign countries, on which the rates of postage are, in numerous instances by treaty provision, determined by weight according to the metric system. Those offices are therefore to be provided with such balances where mails are exchanged with those of foreign countries, and such other offices as from the amount or character of their business in relation to foreign countries the Postmaster-General may deem expedient to provide therewith. If the regulation were given a broader application, and extended to domestic mail matter as well as foreign, the effect would be to put it in the power of the Postmaster-General to virtually establish different postal rates in different parts of the United States, by permitting the avoirdupois system to remain, as hitherto, exclusively in use in some places, while introducing the metric system for use in others. Such a result could not have been contemplated or intended by Congress.

Had the design been to make fifteen grammes the equivalent of a half ounce for all postal rates, it may well be presumed that the provision establishing the equivalent would

Contracts with the Post-Office Department.

have been so framed as to secure, by its own operation, the benefit thereof to all parts of the country alike, and, to that end, have required the Postmaster-General to furnish each and every post-office in the United States with a "postal balance denominated in grammes of the metric system," instead of leaving it discretionary with him to furnish such balances to any other offices than the exchange offices for foreign mails.

I am by the foregoing considerations brought to the conclusion that the provision in section 3880, declaring fifteen grammes of the metric system to be the equivalent of a half ounce avoirdupois, was not intended to apply to *all* postal purposes, but was meant to be limited to mail matter between this and foreign countries.

I am, sir, very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

CONTRACTS WITH THE POST-OFFICE DEPARTMENT.

An advertisement for proposals (under section 3709 Rev. Stat.) for furnishing the Post-Office Department with postage-stamps may, in the discretion of the Postmaster-General, be limited to "steel-plate engravers and plate printers;" the purpose of the limitation being to confine the submission of proposals to such persons only as can satisfactorily furnish the articles needed.

Where the advertisement requires the proposals to be made on blank forms furnished by the Department, the omission or erasure of immaterial words in the proposal of a bidder does not affect the validity of his bid.

An award of contract, by the issuance of an order of the Postmaster-General in the usual way and its transmittal to the bidder, thus indicating the acceptance of his proposal, is sufficient, and, when received by the latter, the award thus made is beyond recall, and the agreement is complete and binding upon the Government.

It makes no difference in such case that a more formal contract was contemplated to be entered into, but has not been executed by the bidder, if the failure be not attributable to his default.

DEPARTMENT OF JUSTICE,
April 17, 1877.

SIR: In answer to your letter of the 9th instant, inquiring, first, whether the limitation in the advertisement made by

Contracts with the Post-Office Department.

the Post-Office Department for proposals from "steel-plate engravers and plate printers" for furnishing the Department with postage-stamps (such limitation being in accordance with the uniform practice of the Department in like cases, as these persons alone were competent to furnish to the Department satisfactorily the article of supply needed by it) was impliedly authorized by law, and met the spirit and intent of the advertisement required by the 3709th section of the Revised Statutes, I have the honor to reply:

In my opinion such limitation was proper, if it was intended to confine an answer to the proposals to such persons only as could satisfactorily furnish the article of supply needed. The manner of advertising is left by the law to the discretion of the Department advertising. No particular form is prescribed, and it is indicated by other sections of the statutes that contracts are to be performed by those who make them, and are not to be the subjects of traffic or transfer. (Rev. Stat., sec. 3737.) It is, therefore, necessary that they should be made with those who, from their capacity, are competent to render the service to be performed, or from their business are able to furnish from its resources that which they contract to supply. By section 3709 of the Revised Statutes, when immediate delivery of articles to be furnished or performance of service is required by public exigency, the articles or services required may be procured by open purchase or contract, but they are to be so procured at the places and in the manner in which such articles are usually bought and sold or such services engaged between individuals. In regard to the procurement of naval supplies, by section 3722 it is provided that "no person shall be received as a contractor who is not a manufacturer of, or regular dealer in, the articles which he engages to supply."

While there is no express provision as to the persons with whom the Postmaster-General shall contract or to whom he shall by advertisement address his proposals, he is justified in doing so to those who are able to do the work or furnish the supplies which he needs in his Department. In such a matter he will exercise his own discretion as to that which shall be for the best interests of the public, and will carry out the policy of the statute by thus limiting his advertise-

Contracts with the Post-Office Department.

ments when he shall deem it expedient so to do. If, knowing the articles needed and knowing that they can only be supplied by particular classes of persons, he sees fit to limit his advertisement to them, he may properly do so. Contracts thus made will not ordinarily be the subject of traffic or of transfer, but will be performed by those with whom they are made. In the present case, if, deeming that the article which he desired, to wit, postage-stamps, could only be supplied by "steel-plate engravers or plate printers," he saw fit to limit his advertisement to them, he might properly do so.

In answer to your second inquiry, "Whether it was proper for the Postmaster-General to disregard the erasure in the proposal of the Continental Bank-Note Company in making the award of the contract to said company," I have the honor to reply:

That while by the advertisement it is required that proposals to be made should be made on blank forms furnished by the Department, yet that the omission or erasure of immaterial words in the proposal of the bidder cannot affect the validity of his bid. By the advertisement, the bid was not to be made by items, but as a whole. It was to be subdivided into items, but this was only the means by which the amount of the bid was to be ascertained. Made as a whole, it was also to be accepted as such; and when the advertisement and proposal are taken together, it will be observed that the omission of the words "of any item thereof" is immaterial, because the bid itself was not made in items, nor did the advertisement invite any such bid.

In answer to your third inquiry, "Did the award of the contract, as shown by the order of the Postmaster-General, which is the only form of order used by the Department in like cases to indicate the acceptance of the proposal, as well as the award of the contract, and as further evidenced by the letter of the Postmaster-General (a copy of which is inclosed and marked Exhibit E), make and constitute a valid contract with the Continental Bank-Note Company binding upon the Government," I have the honor to reply:

The award made was according to the terms of your inquiry, in the usual form, and its transmittal indicated the acceptance of the proposal, as well as the award of the contract,

Contracts with the Post-Office Department.

by the Postmaster-General. By such an award it must be deemed that the Postmaster-General has passed upon all the questions upon which it was his official duty to pass in making it. Such award and the transmittal of it was in the nature of the acceptance of an offer. That an offer made and accepted constitute, between parties competent to contract, a contract, is entirely clear.

Such a transaction is not the less a contract because at some time after signing the award and transmitting it the Postmaster-General determined to recall it. Whether this time was the same afternoon or the next day is unimportant. It was not in fact recalled until information of the acceptance had been transmitted to the parties who had made the bid. The award was transmitted in the usual course of business; and when received by the party whose offer was accepted the contract was complete. The award thus made was in the nature of a preliminary contract, but it was not the less therefore a contract. It provided that the bidder, within ten days after being called upon to do so, should execute a more formal contract. This the bidder has not done; and on the 30th of March he was informed that his bid was annulled. But he has in no respect failed in any duty upon his part. He has apparently been willing at all times to execute the more formal contract which is contemplated by the proposal. If he has not done this, because he has been informed that his bid has been annulled, he is in no default.

If I am correct in holding that the transaction of the 14th of March constitutes a valid contract with the Continental Bank Note Company, in whose favor the award is made, the fact that such company has not executed the more formal contract contemplated by the proposal, and the fact that a letter has been written by the Postmaster-General annulling the contract, are alike unimportant. The Continental Bank Note Company is entitled to the benefit of its contract as one by which the Government is bound.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,

Postmaster-General.

Corporation Engaged in Distilling.

CORPORATION ENGAGED IN DISTILLING.

Under the amendment of section 3140 Rev. Stat., made by the act of February 27, 1877, chap. 69, the word "person," as used in chapter 4 of title 35 Rev. Stat., is to be understood as so including a corporation engaged in distilling spirits that it may give the bond and perform other acts required by the internal revenue law of distillers, in its corporate capacity.

The existence of a penalty in certain sections of that title, prescribing imprisonment as a part of the punishment, is not incompatible with an intent to include under the word person, as therein employed, a corporation.

DEPARTMENT OF JUSTICE,

April 23, 1877.

SIR: I have considered the question submitted in your letter to me of the 17th instant, namely: "Whether the word 'person,' as used in chapter 4 of title 35 of the Revised Statutes, so includes corporations existing under State laws that such a corporation engaged in the manufacture of distilled spirits may give bond and otherwise transact its business with the United States in internal revenue matters in its corporate capacity."

By a general provision contained in section 1 of the Revised Statutes it is declared that, "in determining the meaning of the Revised Statutes, * * * the word *person* may extend and be applied to partnerships and *corporations*, * * * unless the context shows that such word was intended to be used in a more limited sense." And by a provision specially applicable to title 35 of the Revised Statutes, (which has been added to section 3140, as an amendment thereof, by the act of February 27, 1877,) it is further declared that "Where not otherwise distinctly expressed, or manifestly incompatible with the intent thereof, the word *person*, as used in this title, shall be construed to mean and include a partnership, association, company, or *corporation*, as well as a natural person."

Under these provisions, and particularly the one last cited, the word person, in any place where it occurs in chapter 4 of title 35, must be understood to comprehend a corporation, unless this signification of the word is in such place manifestly incompatible with the intent of Congress, or a different or narrower meaning is distinctly expressed.

Corporation Engaged in Distilling.

"The scope of the present inquiry does not call for an examination in detail of all the numerous instances where the word person is used in that chapter; it is sufficient to advert to a few of them only—those found in sections 3247, 3258, 3259, and 3260, wherein the term distiller is defined, a distiller's bond required to be given, and other requirements imposed which are necessary to be complied with in order to lawfully carry on the business of distilling.

In some of these sections there are penal clauses, punishing with fine and imprisonment for the failure to comply with or for the violation of their provisions. It has been thought that, as a corporation cannot be imprisoned, the design was to limit the provisions of such sections to individuals and partnerships. Indeed, the penal clauses referred to appear to furnish the only ground for the inference that the word person, in the sections mentioned and wherever else it occurs in the said chapter, is not meant to include a corporation.

But, as I have already observed, Congress has declared that the word "shall be construed" to include a corporation, if this meaning be not "manifestly incompatible with the intent;" and for the purpose of determining the point now suggested—namely, whether the fact of the existence of a penalty in those sections, prescribing *imprisonment* as a part of the punishment, is incompatible with an intent to include under the word person, as therein used, a corporation—all statutes *in pari materia*, though no longer in force, may properly be taken into view.

The provisions of the internal-revenue laws formerly existing, which were applicable to distillers and the distilling business, included *nominatim* corporations as well as partnerships and individuals. See act of July 1, 1862, chap. 119, sections 40, 57, 58, 64, 68; act of June 30, 1864, chap. 173, sections 54, 71, 72, 79, 82, 126; act of July 13, 1866, chap. 98, sections 9, 21, and 44; act of March 2, 1867, chap. 169, section 16; act of July 20, 1868, chap. 186, section 104; compare also act of June 6, 1872, chap. 315, section 16.

In some of these statutes penal provisions are found similar in character to those referred to as contained in the sections cited from chapter 4 of title 35, and employed in a similar connection. Thus, for example, in section 59 of the act of

Corporation Engaged in Distilling.

1862, as amended by section 24 of the act of March 3, 1863, chap. 74; also in section 73 of the act of 1864, and in the same section as amended by section 9 of the act of 1866; also in sections 23 and 31 of the act of 1866; so, also, in section 25 of the act of 1867.

For convenience, I will give here three extracts from the act of July 13, 1866, which bear directly on the point under consideration:

Section 9 of that act, as an amendment of section 79 of the act of June 30, 1864, enacts, "That a special tax shall be, and hereby is, imposed as follows, that is to say: * * * Distillers shall pay one hundred dollars. Every person, firm, or *corporation*, who distills or manufactures spirits, &c., shall be deemed a distiller." (14 Stat., 115, 117.)

Section 21 provides, "That every person, firm, or *corporation*, who distills or manufactures spirits or alcohol by continuous distillation from grain, * * * shall be deemed a distiller under this act." (*Ibid.*, 153.)

Section 23 declares, "That if any person shall carry on the business of a distiller, * * * without having paid the special tax, as required by law, he shall for every such offense be liable to a fine of not less than double the tax imposed upon the spirits distilled * * * and to imprisonment for a term not exceeding two years." (*Ibid.*, 153.)

These extracts, in the first place, express in clear terms an intent to make the provisions of the internal-revenue law relating to distillers applicable to corporations as well as to individuals; thus the special tax is to be paid by the *distiller*, who may be a "person, firm, or corporation." In the next place, they show that a penalty for the enforcement of the tax, prescribing imprisonment as a part of the punishment imposed, cannot be regarded as incompatible with such clearly expressed intent. And it may reasonably be inferred therefrom that where, in the laws now in force touching the same subject-matter, a like penalty is prescribed, this is not to be viewed as incompatible with an intent to extend the provisions of such laws to corporations, if that intent is otherwise sufficiently indicated by the terms of the provisions themselves.

Independently of the definition of the word *person* given in

Bonds issued under Refunding Act.

section 1 of the Revised Statutes, and also in the amendment of section 3140 made by the act of February 27, 1877, I should be disposed, from a view of the general current of the previous internal-revenue laws affecting distillers and the business of distilling, and from other considerations, to regard the provisions of chapter 4 of title 35, levying a tax and imposing certain requirements (*e. g.*, the giving of a bond, &c.) upon persons engaged in distilling, as extending to corporations so engaged; and accordingly to hold that the word person, as used therein, where such a construction is necessary to produce that effect, must be taken to include corporations. But the language of the amendment referred to is so decisive of this point, that I have preferred to stand alone upon that in this opinion.

The conclusion at which I arrive on the question submitted by you is, that the word person, as employed in the chapter mentioned, so includes a corporation engaged in distilling spirits that such corporation may give the bond required by the internal-revenue law and perform other acts required by the same law of distillers, in its corporate capacity.

I have the honor to be, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

BONDS ISSUED UNDER REFUNDING ACT.

The provision in the act of July 14, 1870, chap. 256, requiring bonds issued thereunder to be made "redeemable in coin of the present standard value," does not authorize the Secretary of the Treasury to stipulate in the body of the bond that it shall be redeemed in coin of the standard value existing at the date of the issue of the bond.

The word "present," in that provision, refers to the date of the act; and the bond cannot be made otherwise redeemable than in coin of standard value at the date of the act.

DEPARTMENT OF JUSTICE,

April 26, 1877.

SIR: In answer to your letter of the 21st instant, requesting my opinion upon the following question, growing out of the refunding act of July 14, 1870, to wit, "Can I stipulate

Bonds Issued under Refunding Act.

in the body of the four per cent. bonds about to be issued that they shall be redeemable in coin of the present value—that is, the standard value at the date of their issue—or must it be the date of the law?" I have the honor to reply:

The act provides for the issue of bonds "redeemable in coin of the present standard value." The word "present" undoubtedly refers as a matter of date to the time when the act was passed, and not to the time when the bonds were thereafter to be issued; it contemplated that a long period would elapse before it would be finally carried into effect, and that changes in the coinage of the country might occur during that period. Whatever changes in the coinage should occur, these bonds were, however, to be redeemable in coin of the standard value as it existed at the date of the act. By this provision the holder was guarded against any depreciation that might take place in the value of the coin, and the Government would not be compelled to pay the additional value should the coinage be appreciated. All the bonds issued under the act were to stand alike, no matter what was the date when such bonds were issued. Each was to be redeemable in coin which was included in the authorized coinage of the country at the date referred to, it being of the standard value as it then existed. Since the law was passed no change has taken place in the standard value of the coin. It is understood that there has been a certain change in the coinage of the country, and that silver dollars have now ceased to exist practically as coin.

It has been further provided, by the statute of February 12, 1873, (Rev. Stat., sec. 3585-6,) that "the silver coins of the United States shall be a legal tender at their nominal value for any amount not exceeding five dollars in any one payment." Notwithstanding this practical change in the coinage of the country, and the passage of this act in regard to legal tender, the form of the bond to be issued by you should not be changed so far as the mode in which it is to be redeemed is concerned. It was not intended that this should be varied according to the changes which might be made in the coinage, because a definite rule was given by reference to the coin of a particular date. That which will pay the bonds heretofore issued under this act will pay the bonds which you may here-

Fifteen Per Cent. Contracts.

after issue. It cannot be authoritatively said that the words "payable in coin" or "payable in gold" are equivalent to the words used by the statute. Even if this leaves open for discussion the question whether bonds issued under this act are or are not redeemable in silver coin of the character and standard which existed July 14, 1870, it is not a doubt which it is in your power to remedy by the use of words in the bond other than those which this statute provides.

While I comprehend the difficulty suggested in your letter, and the convenience that there might be in removing any question upon this matter, I am therefore of opinion that it would not be safe to issue the bonds except as redeemable in coin of the standard value of July 14, 1870.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

FIFTEEN PER CENT. CONTRACTS.

By act of March 3, 1871, chap. 113, sec. 2, Congress appropriated \$500,000 for the construction, under the direction of the Secretary of State, of the south wing of a building designed for the accommodation of the State, War, and Navy Departments. Appropriations were subsequently made for continuing and completing that wing and also for the construction of other wings of the same building, the expenditure of the latter of these appropriations being placed under the direction of the Secretary of War. On the 16th of November, 1871, a contract, with the approval of the Secretary of State, was made with O., by which the latter was to furnish from certain quarries and deliver at the site of the building all the granite required for the south wing, and also all the granite which might be required for the entire building or any additional part thereof, when the construction of the same should be authorized. The contractor, O., was also to furnish all the labor, tools, and materials necessary to cut, dress, and box at the quarries all the granite; in consideration of which he was to be paid the full cost of said labor, tools, and materials, together with the insurance on the granite, increased by 15 per centum of such cost: Held that the contract is not binding upon the United States as to the appropriations made subsequently to the act of March 3, 1871, except so far as it has been adopted and acted upon by those to whom the expenditure of such appropriations was confided, and that the present Secretary of War is not bound to adopt and carry it out as to appropriations intrusted to him.

Fifteen Per Cent. Contracts.

To be "authorized by law," within the meaning of section 10 of the act of March 2, 1861, chap. 84, (section 3732 Rev. Stat.,) a contract must appear to have been made either in pursuance of express authority given by statute, or of authority necessarily inferable from some duty imposed upon, or from some power given to, the person assuming to contract on behalf of the Government.

Authority to contract for the completion of an entire structure, the plan of which has been determined on, cannot be inferred from the mere fact that an appropriation of a certain sum to be expended on the structure has been made. Hence a contract, though it might be good to the extent of such appropriation, could not be made to affix itself to future appropriations and control their expenditure. A contract of this character would be in violation of the spirit of section 3, act of July 25, 1868, chap. 233, (section 3733 Rev. Stat.,) if not of its express terms.

The aforesaid contract with O., as regards the cutting and dressing of the stone, is not a contract for "personal services," within section 10 of the act of March 2, 1861, chap. 84.

Quere, whether the provision in that section for the advertisement of purchases and contracts is directory merely, or whether the failure to make such advertisement avoids the contract.

In view of the action of Congress since the date of the contract with O. and other circumstances, (though not amounting to a ratification of the contract): *Advised* that, whatever may have been the irregularity in its inception by reason of insufficient advertisement, the Secretary of War is justified in proceeding with the contract as it now exists to the extent of the appropriations in his hands, or as it may be modified, should he deem it proper to do so.

O. having given a power of attorney to S., coupled with an interest in the performance of the contract, by which power S. was to sign and receipt for all moneys due under the contract: *Held* that this was a transfer of the contract within section 14 of the act of July 17, 1862, chap. 200; yet that, although the Government may avail itself of such transfer to annul the contract under the provisions of that section, it is not compelled to do so.

DEPARTMENT OF JUSTICE,
April 27, 1877.

SIR: In answer to your communication of the 3d instant, in reference to the contract made by the State Department with Albert Ordway, I have the honor to reply:

This contract was made under the act of March 3, 1871, (16 Stat., sec. 2, p. 494,) by which it was provided:

"That the sum of five hundred thousand dollars be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, for the construction, under the

Fifteen Per Cent. Contracts.

direction of the Secretary of State, on the southerly portion of the premises now occupied by the War and Navy Departments, a building which will form the south wing of a building that, when completed, will be similar in the ground plan and dimension to the Treasury building, and provide accommodations for the State, War, and Navy Departments; the building to be of such kind of stone as may be hereafter determined by the concurrent decision of the Committees of Public Buildings and Grounds of the Senate and House of Representatives; three stories in height, with basement and attic, and of fire-proof construction; the plans to be approved by the Secretary of State, the Secretary of War, and the Secretary of the Navy before any money is expended under the provisions of this act."

In addition to the act of March 3, 1871, the following acts were subsequently passed in relation to this building: An act of May 18, 1872, (17 Stat., 126,) by which \$200,000 was appropriated for continuing the same work during the balance of the then fiscal year; an act of June 10, 1872, (17 Stat., 352,) appropriating \$800,000 for the continuation of the same work, and also \$400,000 for the east wing; an act of May 3, 1873, (17 Stat., 523,) appropriating \$1,500,000 for continuing the work on the new State, War, and Navy Department building; an act of June 23, 1874, (18 Stat., 229,) appropriating \$700,000 for continuing the construction of the same building; an act of March 3, 1875, (18 Stat., 391,) appropriating \$50,000 for completing the south wing under the direction of the Secretary of State, and \$700,000 for continuing work on the east wing under the direction of the Secretary of War; an act of July 31, 1876, (Session Laws of 1875-'76, p. 110,) appropriating \$350,000 for continuing the building under the direction of the Secretary of War; and an act of March 3, 1877, appropriating \$250,000 for the east wing and \$150,000 for preparing granite for the construction of the north wing, both such appropriations to be expended under the direction of the Secretary of War.

The contract in question was made on the 16th day of November, 1871, between the Supervising Architect of the new State Department building, Mr. Alfred B. Mullett, of the first part, with the assent of the Secretary of State, and Albert

Fifteen Per Cent. Contracts.

Ordway, of the second part. By it the party of the second part agreed to furnish, from certain quarries named, and deliver at the site of the building, all the granite that might be required for the exterior walls of the superstructure of the south wing of the building, at such times and in such quantities as might from time to time be ordered by the party of the first part; and further agreed to furnish from the same quarries, at such times as might be ordered and on the same terms, all the granite which might be required for the exterior walls of the superstructure of the entire building, the walls of the court-yard alone excepted, when the construction of the same or any additional part thereof might be authorized.

The agreement made between the parties as to the mode in which the granite should be furnished and payment made is not important to the question before us.

The party of the second part further agreed to furnish all the labor, tools, and materials necessary to cut, dress, and box at the quarries all the granite in such manner as might be directed by the party of the first part, and also shops and sheds sufficient to accommodate one hundred granite-cutters, with a proper proportion of other mechanics.

In consideration of this, the party of the first part agreed to pay, or cause to be paid, the full cost of said labor, tools, and materials, and also the insurance on the granite, increased by 15 per centum of such cost; and a penalty was agreed to be paid by the party of the second part in case of failure to perform any of the agreements upon his part.

The contract further contained a lease of the quarries to the party of the first part, under which the party of the first part was entitled to enter and take granite from the quarries, in case the party of the second part failed to perform the conditions of his agreement.

Under this contract it is claimed by Mr. Ordway that if any appropriation is made toward the completion either of the south wing of the building contemplated or of the remainder of the entire structure, the contract thus made by him so affixes itself to that appropriation that he is entitled to have his contract carried out to the extent of the appropriation. He does not claim that the contract binds the United States to pay more than is appropriated, and agrees that if no fur-

Fifteen Per Cent. Contracts.

ther appropriation is made the contractor will have no claim against the United States for his failing to receive orders for the stone, or for the dressing thereof, necessary to the completion of the building. It will be observed, however, that the claim as made by him is that the person who succeeds to the office held by the Secretary of State at the time when the contract was actually made, or who succeeds to the duties of that officer, has himself no duty to perform except to see to the faithful performance of this contract as made by his predecessor.

The result of such a construction necessarily is, that the officer charged with the expenditures of all subsequent appropriations finds his whole action controlled and anticipated by the action of an officer who had preceded him, and to whom only the expenditure of a single appropriation had been intrusted. This construction treats the mischief intended to be guarded against by the statutes of the United States as being an attempt only to render the United States presently liable. It regards the contract as good in case an appropriation is provided, although it contemplates that an appropriation shall be made before it becomes operative.

By the act of March 2, 1861, (12 Stat., p. 220, sec. 10; Rev. Stat., sec. 3732,) it is provided:

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

Two classes of contracts are authorized by this section: one, where the contract is authorized and an appropriation sufficient for its fulfillment is provided for; the other, where no appropriation sufficient to the completion of the contract is made. That this contract (if the extent and construction be given to it which is claimed by the contractor) was made under an appropriation adequate to its fulfillment is not contended; and it is only necessary, therefore, to consider whether it was authorized by law.

It has been said by some of my predecessors that the prohibition of the statute is so direct and comprehensive, that

Fifteen Per Cent. Contracts.

an authority to contract, where no appropriation adequate to the fulfillment of the contract is made, should be expressly conferred. (4 Opin., 600; 9 Opin., 18.) Without discussing this question, however, in order that a contract should be authorized by law it must appear either that express authority was given to make such contract, or that it was necessarily to be inferred from some duty imposed upon, or from some authority given to, the person assuming to contract on behalf of the United States. If the statute had directed that the Secretary should erect or contract for the erection of the building described, whose dimensions and plan were to be ascertained in the mode indicated by the original act, such authority might perhaps be inferred; or if such direction so to erect was given, provided such erection could be made for a certain specified sum, the authority to contract for the erection of the entire building (provided that the contract could be made within the limit indicated by the act of Congress) might also be inferred. When all that is done is the appropriation of a certain sum to be expended on a certain structure, the plan of which has been determined on, the authority to contract for the completion of the whole structure cannot be inferred. The contract is good to the extent of the appropriation made, and just so far as such appropriation is adequate to its fulfillment. So far as it undertakes to do more than this, it is invalid. Nor can such a contract be binding so as to affix itself to future appropriations, even if it is subject to the contingency that such appropriations shall be made. A contract to pay for articles which would become necessary to a public work already entered upon in the course of its progress was held to be of no validity, even though it provided that such contract should depend for its validity upon the contingency that an appropriation should be made, and such appropriation was in fact thereafter made. ("Piles for dry dock," 4 Opin., 490.)

In the act of March 3, 1871, under which this contract was made, there was no authority given to erect the entire south wing of the building or to contract for it. The sum of \$500,000 was appropriated toward the construction of a building which would form, when completed, the south wing of a larger structure thereafter to be erected.

Fifteen Per Cent. Contracts.

There was no direction to the Secretary to erect the whole of the south wing (far less the entire structure contemplated) or to contract for it. So much money was put into his hands for a contemplated structure. That he was entitled to use toward such a structure only after the plans had been agreed upon in the manner provided for by the act. If, after such plans were made and approved, the sum could not have been used advantageously because inadequate to the completion of the structure, it could not therefore be inferred that the authority of the Secretary was extended so that he was authorized by law to contract for the entire structure, or to make a contract which could be extended to the entire structure, subject only to the contingency of subsequent appropriations. If the appropriation confided to him could not have been used advantageously until the erection of the whole structure should be provided for, that would not give him authority to erect the entire structure or to contract for its erection. It would render it necessary for him to delay expenditures until such provision should be made.

The inconvenience of constructing, or attempting to construct, a building without at its commencement making a contract which shall fully provide for its completion is obvious. That, unless this is done, the edifice may be, instead of a symmetrical structure, an inharmonious patch-work, is also apparent. But this does not give authority by necessary inference to make such a contract. In many instances Congress has given authority to complete the work which it has proposed to do; but that authority cannot be inferred because it may appear upon careful examination by those who are charged with the appropriation that such authority would be judicious and desirable.

I am, therefore, of opinion that this contract, if it can properly be construed as extending to all appropriations made for the entire structure, is invalid as not having been authorized by law. This view is fortified by the statute of July 25, 1868, (Rev. Stat., sec. 3733,) by which it is provided:

“No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement, which shall bind the Government to pay a larger

Fifteen Per Cent. Contracts.

sum of money than the amount in the Treasury appropriated for the specific purpose."

Even if this contract does not bind the Government to pay a larger sum of money than the amount appropriated for the specific purpose, if the construction be given to it which is claimed by Mr. Ordway it binds the Government either to pay this larger sum, or else not to continue to complete the structure which it is proposed to erect; because, according to his theory, if further appropriations be made his contract affixes itself at once to those appropriations. Such a contract is in violation certainly of the whole spirit of this latter statute, if not in absolute violation of its express terms.

I am, therefore, of opinion that the Secretary is not obliged to carry out this contract as made with Mr. Ordway so far as the appropriations intrusted to him are concerned, and that the contract does not have binding force so far as it concerns subsequent appropriations, except so far as it may have been adopted and acted upon by those to whom the expenditure of such appropriations has been confided.

It is, perhaps, unnecessary to consider the question whether this contract is or is not invalid upon the ground that it was not made upon such advertisement as is contemplated by the act of March 2, 1861. That statute provides for advertisement, except where the public exigency requires the immediate delivery of the articles or the performance of the service. Even if the authority be given to the officer of the Government to determine when the exigency exists which allows him to dispense with the advertisement, such exigency cannot be extended by him beyond one of time only. It is quite clear that no immediate public exigency necessitated the immediate delivery of the stone or the performance of preparing and dressing the same; and, in fact, such immediate delivery or performance was not contemplated. The material which was advertised for was granite in the rough; but this forms but a small portion in value to that which was covered by the contract—not more than one-twentieth part. There was no advertisement for doing the large and expensive work of cutting and dressing the stone. The contract is to be taken as a whole, and that portion of it deemed valuable by the contractor relates entirely to cutting and dressing the stone,

Fifteen Per Cent. Contracts.

which constitutes nineteen-twentieths of the expenditure to be made.

It would seem that this work of preparing the stone was treated as coming within the exception of "personal service," which may be contracted for without advertisement. If such latitude is given to this exception, nearly every contract, except for rough materials, may be treated as one for personal service; as skilled and unskilled labor, and generally both, are needed in the performance of the larger number of Government contracts. It is not susceptible of being thus widely construed. A contract for personal service is one by which the individual contracted with renders his personal service to the Government through its agents, thus himself becoming the servant of the Government. The contractor was not such a servant. His performance of his contract was not a personal service, and the workmen employed by him were not in any sense personal servants to the Government. They rendered no service to it; they were under the control of none of its officers, and did no work for it. The aid which they rendered the contractor in doing for the Government that which he agreed to do was, perhaps, personal service to him in the performance of his contract, but was not a personal service to the Government. The contract thus made for the dressing of the stone was made without any compliance with the law. Whether or not the provision for the advertisement of purchases and contracts is directory merely upon the officers of the Government, or whether the failure to make such advertisement will avoid the contract, is a question still much discussed. It is not necessary to decide it in this case, as, upon the other ground, I am of opinion that the contract is not obligatory upon the United States, except so far as it has been acted upon and assented to under each subsequent appropriation.

Fowler's case (3 C. of Cl. Rep., 43) is, to some extent, adverse to the view I have here expressed. In this it was held that, where Congress had authorized the enlargement of the Library of Congress in a certain specified manner, and appropriated \$160,000 for that purpose, to be expended by the direction of the Secretary of the Interior, and the Secretary, without advertising, had contracted for the extension

Fifteen Per Cent. Contracts.

to the amount of \$169,000, such contract was legal. The decision in this case was given by a divided court. The case was never carried further, and was not rediscussed in the Supreme Court.

With much respect for the majority of that court, I am compelled to agree with the dissenting opinion which was given in that case.

It remains only to be considered whether it is shown that this contract has been so ratified by subsequent legislation that it must be deemed now obligatory on the United States.

It is not doubted that the legislative power, which has directed in what manner contracts shall be made, may also legislate to give vitality to those made without authority or in disregard of the regulations which it has prescribed. It should in such case distinctly appear that there has been an intent to so ratify the contract while yet executory in its character and still unperformed as to impose upon the officers of the United States the duty of executing it thereafter.

Upon examining the statutes which follow that of March 3, 1871, I do not find any legislative ratification of such a character of this contract. Nothing is anywhere said in relation to it. The acts proceed only to continue the appropriations, and to transfer the expenditure of them from the Secretary of State to the Secretary of War.

I am, therefore, of opinion that the contract with Albert Ordway has no obligatory force and effect upon the United States, so far as it concerns appropriations made for the several portions of the building subsequently to the appropriation of March 3, 1871, except so far as it has been recognized and acted upon by giving orders proceeding from the Secretary or officer to whom the expenditure of the subsequent appropriations was intrusted.

While there is no such ratification of the contract that it is compulsory that you should now proceed to execute it, it is proper to consider whether, under the legislation which has taken place since it was made and in view of the history of this and similar contracts in connection with such legislation, you are now justified in proceeding with it without further advertisement to the extent of the appropriations in your hands, should you deem it advisable for the best interests of the

Fifteen Per Cent. Contracts.

United States so to do, or if such modifications can be made in the contract as shall render it, in your opinion, advisable so to proceed.

It is clearly important that the whole structure be made of material from the same quarry with that first used. The contracts known as the "15 per cent. contracts," (in which that of Mr. Ordway is included,) have been the subject of frequent public discussion. While I have not been informed that any formal report had been made to Congress directly, or to the Committee on Appropriations, of the terms of this contract, it was a public and well-known fact that under contracts of this character the erection of most, if not all, of the public buildings then being constructed was proceeding. These contracts have also been the subjects of investigation and report by committees of Congress. They have not been ordered to be annulled, or the Secretary directed not to proceed to execute them. On the contrary, appropriations towards the completion of the structure provided for by this contract have continued to be made.

Under these circumstances, whatever may have been the original irregularity in their inception by reason of insufficient advertisement, I consider that you are justified in proceeding with this contract as it now exists, or as it may be modified, if you deem it proper so to do.

Your letter contains the further inquiry, "whether, under the 14th section of the act of July 17, 1862, the interest secured to J. Condit Smith in the contract with Albert Ordway, dated November 16, 1871, and subsequent orders given under the same by reason of the power of attorney given in 1874 by Albert Ordway to said Smith, has worked such a transfer of interest as to annul the contract in question."

By the statute referred to in your inquiry, it is required "that no contract or order, or any interest therein, shall be transferred, by the party or parties to whom such contract or order may be given, to any other party or parties, and that any such transfer shall cause the annulment of the contract or order transferred so far as the United States are concerned."

I am of opinion that there has been such a transfer by Mr. Ordway as enables, upon this ground, the United States to

Pension Agencies and Agents.

avoid this contract. An irrevocable power of attorney was given by him to J. Condit Smith, by which Smith was to sign and receipt for all moneys due under said contract; and this power was not only nominally but actually irrevocable, and Smith clearly had an interest in the performance of the contract. The statute in question is, however, intended only for the benefit of the United States; and while it is said that such transfer shall cause the annulment of the contract or order transferred, it is intended only that it shall do so in case the United States declines to recognize such transfer. While, therefore, the United States may avail itself of such transfer to annul the contract, it is not compelled so to do.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCREADY,
Secretary of War.

PENSION AGENCIES AND AGENTS.

The law concerning the establishment of pension agencies and the appointment of pension agents, as it existed before and at the time of the adoption of the Revised Statutes, reviewed.

Sections 4778, 4779, and 4780 Rev. Stat. produce no change in the previous state of the law on that subject.

The President has authority to consolidate two or more pension agencies into one, by discontinuing some agencies and transferring the business thereof to others.

Upon the discontinuance of an agency the official functions of the incumbent cease; his hold on the office necessarily terminates with its extinguishment, and the tenure-of-office law no longer applies.

Incumbents of agencies, whose districts are subsequently enlarged by the transfer thereto of the business of discontinued agencies, are competent to perform the duties thereof as well after as before the enlargement, and new appointments are not made necessary by the change. It is otherwise with the incumbent of an agency which has been discontinued. The latter cannot be put in charge of another separate and distinct agency without a new appointment.

A bond conditioned for the faithful discharge of all the duties of the office "according to the laws and instructions which are now in force, or which shall be in force at any time during" the continuance of the agent in office, will, in the case of an agent whose agency is enlarged during his term in the manner above indicated and upon whom increased duties are thus devolved, subject the sureties thereon to liability after the enlargement of the agency.

Pension Agencies and Agents.

DEPARTMENT OF JUSTICE,

May 3, 1877.

SIR: In your letter of the 28th ultimo, relative to the subject of reducing the number of pension agencies with a view to lessen the expenses of this branch of the public service, you refer me to sections 4778, 4779, and 4780 of the Revised Statutes, and submit for my consideration the following questions:

1. "Does the law contained in said sections authorize the President to consolidate two or more agencies into one?"
2. "If such authority is conferred and should be exercised, what will be the status, under the law relating to the tenure of office, of an agent whose agency may be abolished by consolidation with some other?"
3. "Will it be necessary to appoint agents for the new districts, or will it be competent for an agent of one of the old agencies, the identity of which has been lost in the consolidation, to perform the duties of pension agent of a new agency without a new appointment?"
4. "If so, can his old bondsmen be held for his transactions in the new agency, or must he execute new bonds?"

It may aid in forming a correct understanding of the sections cited, and thus facilitate the solution of the first question especially, to review the law concerning the establishment of pension agencies and the appointment of pension agents as it existed before the adoption of the Revised Statutes.

Previous to the act of February 5, 1867, chap. 32, (14 Stat., 391,) the provisions of which on that subject are embodied in those sections, the authority to establish pension agencies and to appoint pension agents was vested in the Secretary of the Interior. This authority was derived from the acts of April 20, 1836, chap. 56, (5 Stat., 16,) and March 3, 1849, chap. 108, (9 Stat., 395.) Thus, by the former act, which continued in force until the passage of the above-mentioned act of 1867, it was provided that pensioners should thereafter be paid "at such times and places, by such persons or corporations, and under such regulations, as the Secretary of War may direct;" and by the latter act the power so conferred upon

Pension Agencies and Agents.

the Secretary of War was transferred to the Secretary of the Interior.

In connection with the matter in hand, I may also observe that the act of 1836 forbade any compensation or allowance to be made to the agents appointed thereunder without authority of law. Referring to this provision, Chief Justice Taney, in the case of *The United States vs. White*, (Taney's C. C. Dec., 156), remarks: "At that time the public money was deposited in banks, and the pensions paid by them; but this provision shows that it was the intention of Congress that this duty should always be superadded to the duties of some other appointment or office." However, by the act of February 20, 1847, chap. 13, (9 Stat., 127,) the Secretary of War was authorized "to make such compensation to agents for paying pensions as may be just and reasonable, to be paid out of the fund appropriated for the payment of revolutionary pensions, but in no case to exceed two per centum on moneys disbursed by them;" the amount of compensation allowed to any one agent not to exceed one thousand dollars per annum. This is the first act making provision for the compensation of these agents by the Government. The resolution of July 17, 1862, (12 Stat., 629,) and also the act of June 30, 1864, chap. 183, (13 Stat., 325,) made further provision in regard to their compensation, retaining the feature of the law of 1847 by which a percentage on the amount disbursed is allowed, but enlarging the maximum.

The foregoing presents the state of the law relating to the establishment of pension agencies and the appointment of pension agents as it stood at the time the act of February 5, 1867, was passed.

Recurring now to the act of 1836, it will be seen that the authority to establish such agencies thereby imparted was discretionary. Under that authority the head of Department invested therewith could locate the agency at such place as in his judgment seemed most advantageous to the public service and the convenience of pensioners and fix its limits. It is fairly to be inferred that he could enlarge or diminish the bounds of an agency, or discontinue an agency at a particular place and create one in a different locality, in his discretion. And the practice was in conformity with this view. At the

Pension Agencies and Agents.

same time the agent himself, whose appointment was by that act devolved upon the same head of Department, was liable to be displaced, either by removal at the pleasure of the latter officer, or by discontinuance of the agency.

The act of 1867 withdrew from the Secretary of the Interior the authority to establish pension agencies, and placed it in the hands of the President; it also changed the mode of appointing pension agents. But, aside from this, the law was thereby left to remain substantially as it was before, under certain restrictions which will be stated presently.

By that act the President is "authorized to establish agencies for the payment of pensions granted by the United States wherever, *in his judgment, the public interests and the convenience of the pensioners require:* * * * *Provided,* That the number of pension agencies in any State or Territory shall in no case be increased hereafter so as to exceed three, and that no such agency shall be established in addition to those now existing in any State or Territory in which the whole amount of pensions paid during the fiscal year next preceding shall not have exceeded the sum of five hundred thousand dollars."

Here the authority given to the President is discretionary, and, within the limitations placed upon its exercise by the *proviso*, is essentially the same as that with which the Secretary of the Interior was previously clothed. The latter, as I have already observed, under the power conferred by the act of 1836, could establish agencies, extend or contract their limits, and discontinue any of them, in his discretion; and the practice under that act accorded with this understanding of it. The former, under the power granted by the act of 1867, might, in his discretion, establish agencies, subject to two conditions, viz: (1) that their creation would not *increase* the number then existing in any State or Territory where the whole amount of pensions paid during the previous fiscal year did not exceed five hundred thousand dollars; (2) that their creation would not *increase* the number in any State or Territory so as to exceed three. On the other hand he might, in his discretion, agreeably to the view here taken of the scope of the same power, enlarge or diminish or discontinue any of the agencies already established. Congress saw fit, in the provision quoted above from the last-mentioned act, to

Pension Agencies and Agents.

set bounds to the creation of new agencies, but manifested therein no intention to further limit or modify the authority previously committed to and exercised by the executive branch of the Government.

In regard to the appointment of pension agents, the act of 1867 devolved this upon the President, with the advice and consent of the Senate, and provided that the appointees should "hold their offices for the term of four years and until their successor shall have been appointed and qualified." It also provided that they should "give bond, with good and sufficient sureties, for such amount and in such form as the Secretary of the Interior may approve." Theretofore pension agents gave bond under the provisions of the act of May 24, 1828, chap. 109, with two or more sureties, to be approved by the Secretary, in such penalty as he might direct, for the faithful discharge of their duties.

Yet the change in the mode of appointment, and the regulation as to the term of the office, made by the act of 1867, did not of themselves produce any material alteration of the law with respect to the displacement of the agent. This, as before, might have happened in either of two ways: first, through the exercise of the power of removal by the President, which was then absolute; second, by the discontinuance of the agency. The authority to discontinue an agency, and the authority to remove the officer, though co-existing in the President, were separate and distinct powers; and the loss of the one would not involve a loss of the other. Thus, Congress might have reserved solely to itself the power over the creation of agencies, the determination of their limits, &c., leaving the power to remove the officers appointed thereto in the hands of the Executive; or (as soon after did actually take place by force of the tenure-of-office acts) have qualified the power of removal, leaving with the President, modified or unmodified, the other power.

I pass now to the acts just adverted to, viz, the act of March 2, 1867, chap. 154, (14 Stat., 430,) and the act of April 5, 1869, chap. 10, (16 Stat., 6.) The effect of these acts, as already intimated, was to qualify the power of removal. Thereafter the agent ceased to be removable at the pleasure of the President. So long as the agency existed to which he

Pension Agencies and Agents.

was appointed, though he might be suspended by the act of the President alone, he could not be wholly displaced by the latter except with the concurrence of the Senate. But I perceive nothing in these acts that affects the discretionary authority previously reposed by Congress in the President over the existence of the agency itself. Whilst the tenure of the agent was more firmly established, the duration of the agency continued to be subject to the exercise of that authority whereby it might at any time be terminated. With the extinction of the agency, the official functions of the agent would necessarily end.

As both illustrative of and authoritative upon this point, the practical construction which Congress has placed upon the power granted that body by the Constitution to "ordain and establish" inferior courts from time to time, may be appropriately referred to. Notwithstanding the judges who may be appointed to such courts are to hold their offices by a life tenure under an express provision of the Constitution, Congress has in effect construed that grant to authorize the abolishment of these courts, as well where the same have incumbents as where they are vacant. See the act of March 8, 1802, chap. 8, (2 Stat., 132,) and the act of July 27, 1866, chap. 280, (14 Stat., 300.) By operation of the former of these acts, several judges, appointed to courts established under said grant by a previous law of Congress, were thrown out of office.

The result thus far reached upon the subject of the present inquiry may be summed up as follows:

1. Under the act of February 5, 1867, it was discretionary with the President not only to create agencies for the payment of pensions within the limitations imposed by the *proviso* above referred to, but to enlarge or diminish the bounds of such agencies after their creation, or to discontinue any of them. This authority was a continuing one, and capable of being exercised at any time.

2. Under the same act the President was authorized to appoint pension agents, with the advice and consent of the Senate. Yet by the effect of the tenure-of-office acts of 1867 and 1869 the agents thus appointed were not removable at the pleasure of the President, but were continued in office

Pension Agencies and Agents.

until their successors should be appointed and qualified, this being the limitation of their term.

3. The tenure-of-office acts in no wise affected the authority of the President over the agency as described above. Hence it was competent to him, in the exercise of that authority, to discontinue an agency whenever and wherever in his judgment the public interests required this to be done, and the effect of such action would be to terminate the official relations of the agent with the Government.

Such appears to have been the state of the law at the period of the adoption of the Revised Statutes, and, on examination of the sections to which you in your letter refer me, I can discover no change introduced thereby. Section 4778 does nothing more than reproduce the law as it previously existed respecting the appointment of pension agents and the term and tenure of their offices; section 4779 is a re-enactment of the previous law relating to the bonds of such agents; while section 4780 is almost a literal reproduction of the previous law concerning the establishment of pension agencies; the authority given the President by this section with respect to these agencies being the same precisely as was imparted to him by that law.

In response, then, to the first question which you propose, I answer that the law contained in those sections authorizes the President to consolidate two or more pension agencies into one, by discontinuing such as it is contemplated to dispense with, and transferring the business thereof to such as it is contemplated to retain. One of my predecessors in office has held that an act of the late administration, in January, 1871, consolidating two agencies previously established in the city of New York, was a valid exercise of power. (14 Opin., 147.)

To your second question I answer, that upon the discontinuance of an agency the official functions of the incumbent cease. His hold on the office necessarily terminates with its extinguishment, and the tenure of office law no longer applies to him; he has no status under that law.

In regard to the third question, if, by "new districts," therein mentioned, are meant the districts of agencies already established which may be enlarged by the transfer thereto

Fifteen Per Cent. Contracts.

of the business of other agencies that may be discontinued, I answer that the incumbents of the agencies thus enlarged are competent to perform the duties thereof as well after as before the enlargement, and that new appointments are not required by the change. But an agent whose agency has been discontinued cannot be put in charge of another separate and distinct agency without a new appointment.

The bond required of pension agents, according to the form before me, is conditioned, among other things, for the faithful discharge of all the duties of the office "according to the laws and instructions which are now in force, or which shall be in force at any time during the continuance of the agent in office." This seems to be broad enough to cover the case of an incumbent of an agency which may be enlarged during his incumbency in the manner indicated in the preceding paragraph, and upon whom increased duties may in consequence devolve. Presuming that the fourth question refers to such a case, I answer that, in my opinion, the sureties on the official bond of the incumbent would continue liable after the enlargement of the agency and whilst he remained in office.

I am, sir, very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

FIFTEEN PER CENT. CONTRACTS.

The contract made with C. P. Dixon, October 10, 1873, for granite, and for cutting and dressing the same, for the Philadelphia post-office building, is not obligatory upon the United States so far as it now remains executory and unperformed, and the Secretary of the Treasury need not proceed with it under the appropriations in his hands, unless he deems it for the interests of the Government to do so.

Advertisement for proposals having been made for the rough stone from the quarry, but not for the cutting and dressing of it, before letting the said contract: *Held* that the cutting and dressing were not within the exception of "personal services" in section 3709 Rev. Stat., and that such advertisement did not meet the requirements of said section as regards the contract actually entered into.

The "public exigency" contemplated by that section is one of *time* only.

Fifteen Per Cent. Contracts.

The provision in same section requiring articles or services to be obtained by "open purchase or contract at the place and in the manner in which such articles are usually bought and sold, or such services engaged between individuals," does not apply to a contractor with the United States.

DEPARTMENT OF JUSTICE,
May 3, 1877.

SIR: In answer to your letter of the 6th ultimo, making certain inquiries on the subject of the contract with C. P. Dixon for granite, and for cutting and dressing granite, for the Philadelphia post-office building, I have the honor to reply:

The whole subject of the "15 per cent. contracts," as they are termed, (in which the contract with Mr. Dixon is included,) was carefully considered by me in an opinion to the Secretary of War of the 27th ultimo, in answer to a communication from him dated the 3d ultimo. Of that opinion I have already furnished you a copy; and I beg that it may be considered in connection with this letter, as the answer there given furnishes the reasons for my reply to most of the inquiries in your communication.

The act of June 8, 1872, authorized the Secretary of the Treasury to purchase a site for a post-office in the city of Philadelphia, and to erect a building thereon at a cost, including the cost of the ground and premises so purchased, not exceeding the sum of \$1,500,000. No appropriation was made by this act; but by the act of March 3, 1873, the limitation upon the cost of the building and its site was raised to \$3,000,000, and the sum of \$1,500,000 was appropriated to purchase the site and commence the erection of the building. The act of June 23, 1874, further appropriated the sum of \$750,000, and limited the cost of the building, exclusive of the site, to \$4,000,000. Appropriations have since been made for the continuance of the work in various amounts, but the limitation upon the cost of the building has not been in any way altered.

The contract with Mr. Dixon was made on the 10th day of October, 1873, between Mr. Mullett, as Supervising Architect of the Treasury, acting by authority of the Secretary of the Treasury, and Mr. Dixon. It was not a contract that the building should be erected for any specific sum, but bound

Fifteen Per Cent. Contracts.

the contractor to furnish stone, and the dressing of the same, upon terms therein stated, for the completion of the structure, as such stone might be ordered from time to time by the Secretary of the Treasury. It was a contract, therefore, entirely indefinite as to the amount of expenditure which might be incurred under it; and it is understood to be claimed by the contractor that it so affixed itself to all appropriations which might subsequently be made for the construction of the building, that he under it is entitled to furnish the stone, and the dressing of the same, upon the terms therein stated, no matter what may be the amount of expenditure involved.

Assuming that a contract might have been made which would have been authorized by law, if made for the erection of the building for the sum or sums named in the act of appropriation, it does not follow that a contract of this character, if such construction can be given to it as is claimed, could properly have been entered into. If it were so, the limitation upon the cost of the building and site imposed by Congress would be entirely annulled, and the United States involved in an indefinite expenditure for the building in question.

I am of opinion that this contract is not obligatory upon the United States, except so far as orders have been given under it, and it has been recognized by the successive Secretaries of the Treasury since it was made; that it cannot have the effect claimed for it by the contractor; and that you are not now obliged to recognize it and carry it out to the extent of the appropriations now in your hands, or which may hereafter come to your hands, unless you are of opinion that such a course is demanded by the interests of the United States, or unless such modification may be made in the contract as shall render it, in your opinion, expedient that it be carried out to the extent of the appropriations in your hands. Unless the contract was made by the Secretary of the Treasury within the limits imposed by law, he did not have authority to bind his successors, or to make a contract which should affix itself to subsequent appropriations made by Congress. It was in his power only to provide for the expenditure of the sum which was placed in his hands for the erection of the structure and purchase of the site.

Fifteen Per Cent. Contracts.

I proceed to answer the inquiries proposed in your letter *seriatim*.

The first and second inquiries are, "Whether these contracts thus entered into were authorized by law, in view of section 3709 Rev. Stat., which provides that all purchases and contracts for supplies or services, &c., shall be made by advertising, &c., there having been no advertisement for the cutting of the granite, but only for the stone rough from the quarry," and "Whether, under the same section, 3709 Rev. Stat., these contracts for cutting granite can be construed as coming within the exception as being for 'personal services.'"

No such advertisement as was required by law was made for the contract in question. The advertisement only called for proposals for furnishing the rough stone, while the contract as actually entered into embraced an amount from ten to twenty times as large for the cutting and dressing of the stone.

This contract for cutting and dressing the granite cannot be considered as coming within the exception "for personal services," as the men actually doing the work were not servants of the United States, and the contractor himself was bound by the terms of his contract only with the United States, but was not its personal servant.

The third and fourth inquiries are "Whether, upon the facts stated," (in Mr. French's letter,) "the contracts for cutting granite can be considered as coming within the provisions of the same section, 3709 Rev. Stat., as being 'required by the public exigency,'" and "Whether the decision of the Government officer making such contract is conclusive that the 'public exigency' did exist."

The "public exigency" contemplated by this section is one of time only. While the officer intrusted with making the contract may be entitled himself to adjudicate whether or not the facts are such as to require immediate delivery of the articles contracted for, or the immediate rendering of the service desired, yet the exigency cannot be extended beyond that of time only, and if he adjudicates any other state of facts to be an exigency he is not proceeding within the authority given him by law.

That there was no exigency of time in the present case is

Fifteen Per Cent. Contracts.

clear from the character of the contract itself, which contemplated that it might be many years before the articles contracted for would be furnished, and the contract itself did not purport to be made upon any exigency of time.

The fifth inquiry is, "Whether, if such 'public exigency' must be deemed to have existed, the contract is binding upon the United States, if the articles or service were not procured by the contractor 'by open purchase or contract at the place and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals,' as provided in the last clause of said section 3709."

An answer to this inquiry is perhaps superfluous in connection with the answers heretofore made. I do not understand that the prohibition upon the officers of the United States to obtain articles or service except by "open purchase or contract at the place and in the manner in which such articles are usually bought and sold, or such services engaged between individuals," applies to a contractor with the United States.

The sixth inquiry is, "Whether these contracts, in view of sections 3732 and 3733 Rev. Stat., so far as they extend beyond the current financial year during which they are executed, can be held as binding upon the United States;" and the eighth inquiry is, "In what manner such 15 per cent. contracts, so far as unfinished, if held to be illegal, can be avoided by the Secretary of the Treasury?"

The answer to these inquiries is given in the earlier portion of this opinion. I am of opinion that these contracts are not obligatory upon the United States, so far as they now remain executory and unperformed, and that you are now entitled to decline to proceed with them so far as the appropriations in your hands are concerned, unless you shall deem it for the interests of the United States so to proceed.

The seventh and ninth inquiries embrace a somewhat different subject, and are, "Whether said C. P. Dixon, upon the facts disclosed in Mr. French's report, holds any property, rights, or credit of the United States—by reason of his purchase of the Dix Island property for the grossly inadequate price of \$1,461.32 given for property worth more than \$100,000, and by his receiving for a part of such property, upon a reappraisal thereof, about \$40,000 from the United

Fifteen Per Cent. Contracts.

States—by a title so illegal or inequitable that he can be compelled to account therefor, considering the approval given to these transactions by the various officers of the Government as stated in said report;” and “Whether, if such liability on the part of said Dixon to account for such property, rights, or credit exists, the Secretary of the Treasury may rightfully withhold payments which are due, or to become due, to said Dixon under the contract of October 10, 1873.”

The contract made with Mr. Dixon, by which he purchased the property for the price named, (which is certainly very far below the amount which it cost the United States, and apparently is entirely inadequate to its value,) is one which was made by a bid at public auction. After the sale had been entirely completed the property was again taken by the United States. The whole subject of the sale at public auction and the taking of the property by the United States was considered by the then Secretary of the Treasury, under a full report upon the subject from the Solicitor of that Department. A variety of claims were made by Mr. Dixon not necessary to be particularly stated, and upon the recommendation of the Solicitor of the Treasury the then Secretary, Mr. Bristow, agreed that the value appraised at the time the property was taken by the United States should be paid to Mr. Dixon, provided that he would accept it in full satisfaction of all claims that have or may arise in regard to the transaction. The whole subject was therefore before the Secretary, and, upon full consideration and advisement with the law officer of his Department, the settlement made was assented to. In so doing, I am of opinion that he acted within the scope of his authority, and that it is not now possible to set aside the transaction of the sale of these articles to Mr. Dixon, or the subsequent purchase of them by the United States.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Amendments of Revised Statutes.

AMENDMENTS OF REVISED STATUTES.

The amendments of sections 2659 and 2660 Rev. Stat., made by the act of February 27, 1877, chap. 69, are not retroactive. That act takes effect, not from the date of the Revised Statutes which it amends, but from the date of its own enactment, except in a case where (as in the amendment of section 1375) the purpose to make it retrospective is distinctly indicated. (Opinion of April 7, 1877, referred to and reaffirmed.)

DEPARTMENT OF JUSTICE,

May 4, 1877.

SIR: In your letter of the 2d instant, you inform me that "it is claimed in behalf of certain officers interested that the amendments made to sections 2659 and 2660 of the Revised Statutes by act of Congress entitled 'An act to perfect the revision of the statutes of the United States and of the statutes relating to the District of Columbia,' approved February 27, 1877, are retroactive, and that said amended sections have the same force and effect as though originally enacted as they now stand."

This claim appears to me unfounded. There is nothing in the language of the law from which it can be properly inferred that these amendments were intended to be retroactive in their operation; and the statute as a whole must be considered as taking effect, not from the date of the Revised Statutes which it undertakes to amend, but from the date of its own enactment. The intent to raise the salaries of the officers interested, after the services rendered by them were performed, by a retroactive amendment, should appear either by language express in its character or clearly open to such inference. No intent of this character appears.

In answer to the Secretary of War, on the 7th ultimo, I had the honor to inform that officer that, in my opinion, the statute in question was one in its character prospective only, unless it should be found in reference to certain of the provisions that they are specially made retrospective, in which case a different rule would prevail. I inclose a copy of that opinion, as giving a more full statement of the reasons for the view which I now indicate.

At the time that opinion was written I had not observed that in reference to the amendment made to section 1375 of

Appraiser General at New Orleans.

the Revised Statutes language was used which clearly gave it a retrospective character.

The fact that such language was used in reference to one amendment fortifies the argument that the general purpose of the act is prospective in its operation, and that it is retrospective only where that purpose is distinctly indicated.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

APPRAISER GENERAL AT NEW ORLEANS.

The provision in the act of March 3, 1857, chap. 108, which authorized the appointment of an additional appraiser general, (who was assigned to duty at the port of New Orleans,) was repealed by force of section 5596 Rev. Stat.

Sections 2726 and 2728 Rev. Stat. do not, by implication, authorize the appointment of a general appraiser in addition to the number authorized by section 2603 Rev. Stat.

Accordingly no authority of law exists for continuing the office of general appraiser at New Orleans.

DEPARTMENT OF JUSTICE,

May 9, 1877.

SIR: In your letter of the 30th ultimo, you inform me that the provision in the act of March 3, 1851, chap. 38, which authorized the appointment by the President, with the advice and consent of the Senate, of four appraisers of merchandise, (known as general appraisers,) is embodied in section 2608 of the Revised Statutes, but that the provision in the act of March 3, 1857, chap. 108, which authorized the appointment, in like manner, of an additional appraiser general, to be employed in certain districts, namely, the "districts or ports of Florida, Alabama, Mississippi, Louisiana, and Texas," is omitted from the Revised Statutes; and, directing my attention to sections 2726 and 2728 of the revision, you request an opinion from me upon the question whether there is any authority of law for the continuance of the last-mentioned office.

It is to be observed, in this connection, that the four gen-

Appraiser General at New Orleans.

eral appraisers authorized by the act of 1851 were not attached to particular ports or districts by the act itself; but, by regulation of the Secretary of the Treasury, made pursuant to authority given by the act, they were assigned to duty at particular ports, as follows: One such appraiser to each of the ports of Baltimore, Philadelphia, New York, and Boston. So the additional appraiser general authorized by the act of 1857, though not attached to any particular port or district by that act, was in like manner assigned to duty at the port of New Orleans.

The provision in the act of 1857, referred to, appears to have been repealed by force of section 5596 of the Revised Statutes; so that, since the revision, the number of general appraisers authorized must be deemed to be limited to four, as provided for in said section 2608, unless an additional officer of that description is *impliedly* authorized by said sections 2726 and 2728.

Section 2726 fixes the salary of the general appraiser at New York; and section 2728 fixes the salaries of the "local appraisers and general appraisers" at Boston, Philadelphia, Baltimore, and New Orleans. There being four places named in the latter section, if it were susceptible of no other construction than that Congress meant thereby to provide for at least one general appraiser at each place, (which, with the one provided for in section 2726, would make five such appraisers,) the inference would seem to be warranted that the appointment of a general appraiser for each place was contemplated. But it admits of a different construction, and, considered in connection with the repeal of the provision in the act of 1857, and the restriction in section 2608 as to the number of appraisers authorized, one more consonant with this legislation. The chapter to which it belongs deals specially with the "qualifications, pay, and duties" of the customs officers; whilst the establishment of collection districts and ports, and the appointment of officers therefor, are specially dealt with in the next preceding chapter; and it is, I think, to be understood as though it read in this wise: "The local appraisers and the general appraisers, either or both, as the case may be, who are authorized by the preceding chapter to be appointed at Boston," &c.

Use of the Official Envelope.

My conclusion is that sections 2726 and 2728 do not, by implication, authorize the appointment of a general appraiser in addition to the number authorized by section 2608.

In answer to your question, then, I have the honor to state that, in my opinion, no authority of law exists for the continuance of the office to which you refer.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

USE OF THE OFFICIAL ENVELOPE.

Sections 5 and 6 of the act of March 3, 1877, chap. 103, providing for the use of the official envelope, do not forbid the use of stamps by the Executive Departments. Each Department designated in section 2 of the act of March 3, 1877, chap. 102, and in the corresponding provision in the act of August 15, 1876, chap. 287, may, in its discretion, use stamps for official mail matter under and in conformity to these acts, or use the official envelope for such matter under and in conformity to sections 5 and 6 of the act of March 3, 1877, chap. 103, or it may use both.

The use of the official envelope is limited to the Executive Departments, and the bureaus or offices therein, at the seat of Government.

Only those bureaus and offices can be deemed bureaus or offices in any of these Departments which are constituted such by the law organizing the Department; the latter, with its bureaus or offices, being in contemplation of the law an establishment distinct from the branches of the public service and the officers thereof which are under its supervision.

The provisions of the act of March 3, 1877, relating to the official envelope, do not extend to the Executive. In the absence of a special provision for stamps for his official mail matter, the appropriation for contingent expenses of the Executive office is applicable to that object, and to the extent that it is so applied authority exists for the issue of stamps to him.

The State and other Departments named in section 2 of the act of March 3, 1877, chap. 102, being thereby authorized to make requisition for stamps "not exceeding the amount stated in the estimates" submitted to Congress, *semble* that where one of these Departments has failed to submit an estimate it is precluded from making the requisition, and thus is restricted to the use of the official envelope.

The provision in the act of February 27, 1877, chap. 69, amending section 3915 Rev. Stat., does not authorize the issue of official postage-stamps for the use of the Post-Office Department during the next fiscal year, if no appropriation has been made therefor. In this case the use of the

Use of the Official Envelope.

official envelope, under the act of March 3, 1877, chap. 103, is the only mode of transmitting mail matter which will be available to that Department and the bureaus or offices therein during that year.
What provision exists in such case for official mail matter of postmasters considered and stated.

DEPARTMENT OF JUSTICE,
May 16, 1877.

SIR: Your letter of the 4th instant, inclosing a paper submitted to you by the chief of the stamp division of your Department, presents for my consideration substantially the following case and questions:

The act of February 27, 1877, chap. 69, entitled "An act to perfect the revision of the statutes of the United States," &c., contains the following provision:

"Section thirty-nine hundred and fifteen is amended by adding at the end of the section the following: 'The Postmaster-General shall cause to be prepared a special stamp or stamped envelope, to be used only for official mail matter, for each of the Executive Departments, and said stamps and stamped envelopes shall be supplied by the proper officer of said Departments to all persons under its direction requiring the same for official use; and all appropriations for postage made prior to March third, eighteen hundred and seventy-three, shall no longer be available for said purpose; and all stamps and stamped envelopes shall be sold or furnished to said several Departments or clerks only at the price for which stamps and stamped envelopes of like value are sold at the several post-offices.'" (Session Laws, 2d sess. 44th Cong., p. 250.)

By the act of March 3, 1877, chap. 102, making appropriations for the legislative, executive, and judicial expenses for the year ending June 30, 1878, it is provided as follows:

"SEC. 2. That the Secretaries respectively of the Departments of State, Treasury, War, Navy, and Interior, and the Attorney-General are authorized to make requisitions upon the Postmaster-General for the necessary amount of postage-stamps for the use of their Departments, not exceeding the amount stated in the estimates submitted to Congress; and upon presentation of proper vouchers therefor at the Treasury, the amount thereof shall be credited to the appropria-

Use of the Official Envelope..

tion for the service of the Post-Office Department for the same fiscal year." (*Ibid.*, p. 319.)

A provision exactly like the one just cited is also found in the act of August 15, 1876, chap. 287, making appropriations for the legislative, executive, and judicial expenses for the year ending June 30, 1877. (See Session Laws, 1st sess. 44th Cong., pp. 169-70.)

In the act of March 3, 1877, chap. 103, entitled "An act establishing post-roads, and for other purposes," are found these provisions :

"SEC. 5. That it shall be lawful to transmit through the mails free of postage any letters, packages, or other matters relating exclusively to the business of the Government of the United States: *Provided*, That every such letter or package, to entitle it to pass free, shall bear over the words 'Official business' an indorsement showing also the name of the Department, and if from a bureau or office, the names of the Department and bureau or office, as the case may be, whence transmitted. And if any person shall make use of any such official envelope to avoid the payment of postage on his private letter, package, or other matter in the mail, the person so offending shall be deemed guilty of a misdemeanor, and subject to a fine of three hundred dollars, to be prosecuted in any court of competent jurisdiction.

"SEC. 6. That for the purpose of carrying this act into effect, it shall be the duty of each of the Executive Departments of the United States to provide for itself and its subordinate offices the necessary envelopes; and, in addition to the indorsement designating the Department in which they are to be used, the penalty for the unlawful use of these envelopes shall be stated thereon." (Session Laws, 2d sess. 44th Cong., pp. 335-6.)

No appropriation is made for official postage-stamps for the Executive office, or for the Post-Office Department, for the fiscal year ending June 30, 1878; and, among the estimates of appropriations required for the service of the same fiscal year submitted to Congress by the Secretary of the Treasury, December 4, 1876, (Ex. Doc. No. 5, 44th Cong., 2d sess.,) none for official postage-stamps for the Department of State appears.

Use of the Official Envelope.

Hereupon the following questions arise :

(1.) Is the use of official envelopes, authorized by the act last referred to, so imperative upon the Executive Departments that the latter are not at liberty to use the stamps mentioned in the other acts above cited? Or is it discretionary with such Departments to use either the official envelopes, or the stamps, or both?

(2.) Is the use of the official envelopes limited to the Executive Departments and the bureaus or offices therein at the seat of Government, or does their use extend to subordinate officers throughout the country, such as postmasters, collectors of internal revenue, pension agents, registers of land offices, &c.?

(3.) Is there any authority for the issue of stamps to the Executive and to the Post-Office and State Departments during the next fiscal year?

1. The provisions of the post-roads act of March 3, 1877, authorizing the use of official envelopes, do not in terms forbid the future use of stamps by the Executive Departments. Whether they in effect amount to such a prohibition is a question of legislative intent, which must be determined by viewing them in connection with the other statutory provisions mentioned relating to the same subject-matter.

The provision quoted from the act of February 27, 1877, passed but four days previously, indicates that Congress then contemplated a continuance of the use of stamps by the several Departments for official purposes; whilst the section quoted from the appropriation act enacted on the same day (March 3, 1877) makes specific provision for the use of stamps for such purposes by the Departments named therein during the next ensuing fiscal year. At the same time, under the appropriation act of August 15, 1876, a similar provision existed for the current fiscal year.

The two sections already cited, providing for the use of official envelopes, operate from the date of the act in which they appear. If this provision was meant to supersede the other, if it was meant to exclude or forbid the use of stamps by the Departments, the enactment of those sections at once abrogated the authority for such use during the current fiscal year previously given by the act of August 15, 1876. But

Use of the Official Envelope.

such an intention is hardly consistent with the action of Congress continuing the same authority during the next fiscal year, by a statute passed on the very day of the passage of the statute containing those sections. Indeed, this action manifests an intention quite the contrary.

The statutes just adverted to, bearing the same date, stand on a footing of equality as expressions of the legislative will, and their provisions must be so construed, if possible, as to give effect to each. As no repugnancy exists between the particular provisions to which reference is made, and each of them is capable of operating along with the other, it seems to me that they must be regarded as intended so to operate. Thus, two modes appear to be provided for transmitting official matter through the mail during the next fiscal year; and, in the absence of anything in the law indicating a different intent, it may well be presumed that the same modes were meant to be available for use during the remainder of the current fiscal year.

The conclusion is, that the above sections, authorizing the use of official envelopes, do not forbid the use of stamps by the Departments. Each Department designated in the provisions cited above from the appropriation acts of August 15, 1876, and March 3, 1877, is at liberty to use stamps for official purposes under and in conformity to those provisions, as well as to use official envelopes for the same purposes under and in conformity to the provisions cited from the post-roads act of March 3, 1877; and the use of either the one or the other, or both, is left discretionary therewith.

2. In regard to the inquiry, whether the use of the official envelope is limited to the Executive Departments and the bureaus or offices therein at the seat of Government, I think that an affirmative answer is required by the language of the statute.

The general clause in section 5, quoted above, viz, "that it shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government," is qualified by the proviso in the same section, which requires the letter or package to have indorsed thereon "the name of the Department, and, if from a bureau or office, the names of the Department and

Use of the Official Envelope.

bureau or office, as the case may be, whence transmitted." That the word "Department" here means Executive Department is indicated by the language employed in the next section, requiring "each of the Executive Departments" (for the purpose of carrying the law into effect) "to provide for itself and its subordinate offices the necessary envelopes"; and that the words "bureau or office" mean a bureau or office *in* such Executive Department is to be implied from the requirement that the name of the Department shall appear on the letter or package with that of the office or bureau.

The several Executive Departments are by law established at the seat of Government; they have no existence elsewhere. Only those bureaus and offices can be deemed bureaus or offices in any of these Departments which are constituted such by the law of its organization. The Department, with its bureaus or offices, is in contemplation of the law an establishment distinct from the branches of the public service and the offices thereof which are under its supervision. Thus, the office of postmaster, or of collector of internal revenue, or of pension agent, or of consul, is not properly a *Departmental* office—not an office *in* the Department having supervision over the branch of the public service to which it belongs. True, an official relation exists here between the office and the Department, one, moreover, of subordination of the former to the latter; but this does not make the office a part of the Department.

As, then, the words "bureau or office," employed in the *proviso*, are to be taken to signify a bureau or office in any of those Departments, such bureau or office must be of the same locality, established at the seat of Government. The phrase "subordinate offices," occurring in the next section, does not enlarge the signification of those words, but is to be understood as referring to offices of the same description as are included thereby.

3. The remaining question is, whether any authority exists for the issue of stamps to the Executive and to the State and Post-Office Departments during the next fiscal year.

The Executive does not come within the second section of the act of March 3, 1877, providing for the use of official

Use of the Official Envelope.

stamps; nor do the provisions of the post-roads act of March 3, 1877, authorizing the use of official envelopes, appear to extend to him. Since the withdrawal of the franking privilege from the Executive, a small appropriation has sometimes been made specifically for official postage-stamps for his use; but no such appropriation was made for the year ending June 30, 1875, and, as already stated, none has been made for the year ending June 30, 1878. These instances of omission to make special provision are, however, not to be regarded as significant of an intent on the part of Congress to have the Executive defray the expense of postage on his official mail matter out of his own pocket. It is rather to be inferred therefrom that the appropriation for contingent expenses of the Executive office was, on each occasion, considered applicable to, and sufficient for, that and other objects of expenditure of a similar character. Accordingly, in the absence of a special provision for stamps for the next fiscal year, the appropriation for contingent expenses of the Executive office may be deemed to apply to that object; and to the extent that it is so applied authority exists for the issue of stamps to the Executive.

The provision in the act of February 27, 1877, authorizes the issue of official postage-stamps to each of the Executive Departments, and, consequently, includes the Post-Office Department; but it contemplates that such stamps shall only be furnished "at the price for which stamps, &c., of like value are sold at the several post-offices." If there is no appropriation for such stamps for the use of the Post-Office Department during the next fiscal year, I think that authority to issue them to that Department for that year does not exist. In this case, the mode provided by the post-roads act of March 3, 1877, for the transmission of official matter through the mail, viz, by the use of an official envelope, is the only one which will be available to that Department and the bureaus or offices therein during that period.

The State Department is (as are the other Departments named in the second section of the appropriation act of March 3, 1877) authorized to make requisitions for official stamps for the next fiscal year, "not exceeding the amount

Use of the Official Envelope.

stated in the estimates" submitted to Congress. If no estimate has been submitted to Congress for that Department, it would seem to be precluded from making the requisition; and in that case there would be no authority to issue official stamps for its use. Thus, in such case, that Department, like the Post-Office Department, will be restricted to the use of the official envelope during the fiscal year mentioned.

If the law authorizing the use of the official envelope does not apply to local postmasters, they not holding "subordinate offices" in the Post-Office Department in the sense in which those words are used in the statute, it may be inquired how the postage upon their official communications is to be paid, and whether they are to continue the use of official stamps.

As the expenditure for the purpose of payment of postage is a necessary one in the administration of the duties of their respective offices, it is one for which they should be allowed, no different intent appearing. It may be here incidentally remarked, that in certain cases of officials in other Departments, as in the provision for the payment of pension agents, the intent that the agent shall himself pay the postage on official matter is clearly contemplated. (Rev. Stats., sec. 4782.) This allowance can properly be made under the provision for "miscellaneous and incidental items" in the appropriation for the postal service, and such officers can continue to purchase stamps for their official use as they have heretofore done. If this appropriation should not prove sufficient, the matter would be required to be hereafter remedied by a deficiency bill.

I have the honor to be, very respectfully,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

Fifteen Per Cent. Contracts.

FIFTEEN PER CENT. CONTRACTS.

The proposed modification of one of the contracts for furnishing and dressing stone, known as the "15 per cent. contracts," may be made, and the performance of the contract as modified proceeded with, without further advertisement, if the modification would render the contract less onerous upon the United States than it is in the form in which it was originally made.

DEPARTMENT OF JUSTICE,

May 17, 1877.

SIR: In answer to your letter of the 15th instant, inquiring whether one of the contracts known as the "15 per cent. contracts" may be so modified by consent of parties as to strike out therefrom the clause in the contract which is to the following effect: "And the party of the first part will furthermore pay to the party of the second part, or their legal representatives, the full expense and cost of such working, dressing, insuring, and boxing of said stone as may be required by the party of the first part to be done at the said quarry, increased by 15 *per centum* thereof," and to insert in lieu thereof a specified price per foot for which the work of dressing and boxing the granite shall be performed by the contractor, and especially whether such modification may be made without advertising for competition, I have the honor to reply:

That under the circumstances (which were detailed somewhat at length by me in the printed opinion of April 27, 1877, to which you refer) I was of opinion that the Secretary was justified in proceeding with the contract in the form as it then existed, or as it might thereafter be modified by him if he deemed it proper thus to modify it. It is not necessary to restate the reasons which led to that opinion, as they are there fully set forth. As the Secretary may proceed with the contract notwithstanding any irregularity, if any, in its inception by reason of a want of sufficient advertisement, he may also proceed with the contract provided any modification may be made of it which shall render it, in his opinion, less onerous upon the United States than it is in the form in which it was originally made; and he must determine whether such modification will have the effect referred to. It does not seem to me that he could properly consent to any modification which would give to the contractor a greater advantage than he

Assignment of Officers' Pay-Accounts.

now has, or expose the Government to a greater burden than it is now subject to. If the contract may be so modified as to impose upon the Government a less burden than it now has, the same reasons which lead me to believe that the Secretary may properly proceed with it in its present form induce me to think that he also may proceed with it in such modified form, and this without further advertisement.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

ASSIGNMENT OF OFFICERS' PAY-ACCOUNTS.

The Secretary of War may properly issue an order authorizing paymasters of the Army to make a certificate upon the pay-accounts of officers in the following form: "The within account is believed to be correct, and would be paid by me if I had public funds available for that purpose." Such certificate would not come under the prohibition of section 3679 Rev. Stat.

Section 3477 Rev. Stat. does not forbid the transfer or assignment of their pay-accounts by Army officers after the same become due. Such accounts may be lawfully transferred or assigned when due, the regulations of the Army relating to this subject (par. 1349, Art. XLV, Regulations of 1863) being complied with.

DEPARTMENT OF JUSTICE,
May 17, 1877.

SIR: I have the honor to acknowledge the receipt of your communication of the 14th instant, inquiring whether it would be a violation of section 3679 or any other section of the Revised Statutes, or of any law, to issue an order authorizing paymasters to make a certificate in form such as the one inclosed by you upon the pay-account of an officer, and also whether you may properly authorize officers to make an indorsement and transfer of their accounts for a valuable consideration.

The certificate proposed is in the following form:

"The within account is believed to be correct, and would be paid by me if I had public funds available for that purpose.

"RICHARD ROE,
"Major and Paymaster, U. S. A."

Assignment of Officers' Pay-Accounts.

I have the honor to reply that it would not be, in my opinion, a violation of section 3679 of the Revised Statutes, referred to by you. That section forbids the expenditure of "any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract for the future payment of money in excess of such appropriations."

The latter clause of this section is the only one that need be considered. In reference to that, I think it is quite clear that a statement by a paymaster that he believes an account to be correct, and that he himself would pay it if he had public funds available for the purpose, does not involve, nor is it an attempt to involve, the Government in any contract for the future payment of money in excess of the appropriations. It is simply a recognition by an accounting officer that there is apparently, at the time referred to by the date of the certificate, an amount due the officer such as is stated in the account upon which it is indorsed. There is no promise to pay, either upon his own behalf or upon that of the United States.

I do not find upon examination any other law which need be considered in connection with this subject except the statutes of July 29, 1846, and February 26, 1853, the provisions of which are condensed in section 3477 of the Revised Statutes. This forbids transfers or assignments of any claim against the United States, unless the claim shall be allowed, the amount due ascertained, and a warrant issued for the payment thereof.

This section has usually been considered to refer to the transfer of unliquidated claims against the United States, and not to apply to those cases where there was a definite ascertained sum due. Whether this construction is or is not correct need not, however, be discussed, as I think it obvious, upon examination of the regulations for the Army, that it can have no application to the transfer by an officer of his pay-account when actually due.

The regulations of the Army as at present in force are known as the "Regulations of 1863." They were prepared by the then Secretary of War, with the approval of the President of the United States, and by the statute of July 28, 1866, they were ordered by Congress to be enforced until that body

Assignment of Officers' Pay-Accounts.

should otherwise direct. They have, therefore, the force and effect of law.

By regulation 1349, article XLV, it is provided:

"No officer shall pass away or transfer his pay-account not actually due at the time, and when an officer transfers his pay account he shall report the fact to the Paymaster-General and to the paymaster expected to pay it."

The prohibition of a transfer of a pay-account when it is not actually due, coupled with the direction as to how the officer shall proceed when he transfers it after it has become due, clearly indicates the right on the part of the officer thus to transfer it.

An examination of the previous regulations of the Army strengthens this view, as the right of an officer to transfer his pay-account when due has been one which has been for a long time recognized. The rule upon this subject in the Regulations of 1857 need not be considered, as it is verbally the same as in the Regulations of 1863, at present in force. The rule in the Regulations of 1841 varies upon the point which we are considering only verbally. The rule upon this subject in the Regulations of 1835, which is in regulation 11, Article XLVIII, was as follows:

"Officers shall not pass away or transfer their pay-accounts for any amount not actually due at the time. When an officer transfers his accounts for pay which is due, he will immediately communicate the fact to the Paymaster-General and to the paymaster by whom such accounts are expected to be paid, otherwise paymasters are prohibited paying them. No graduate of the Military Academy shall transfer his accounts, even for pay due, the first year after he shall have graduated."

The last clause of this regulation recognizes by implication with great distinctness the right of all other officers to transfer their pay-accounts when due.

Section 1291 of the Revised Statutes—"No assignment of pay by a non-commissioned officer or private previous to his discharge shall be valid"—does not apply to the case of officers.

The reason why a distinction has always existed in this respect between officers and men is easily found. It is often impossible to pay the Army at the times when the pay is

Hire of Buildings.

properly due. It may be in active service, or its troops distributed in small detachments, which cannot always be promptly reached by the officers in the Pay Department. The soldier is provided with food and clothing by the United States, according to the terms of his enlistment. The officer is expected out of his pay to provide for himself his own subsistence, clothing, and means of support, and such provision continues to be required of him after his pay becomes overdue. If, therefore, when the time arrives that his pay is actually due, he does not receive it, he might often be placed under serious embarrassment unless he were permitted to transfer his account for a valuable consideration. The regulations of the Army have, therefore, addressed themselves simply to the subject of preventing the officer from making such transfer before the pay shall actually have become due, and have left him at liberty (taking such steps as are required by the regulations in regard to notice to the Paymaster-General and the paymaster from whom he expects to receive the pay) to transfer it at that time.

I am therefore of opinion, first, that you may properly direct the paymaster to place upon the pay-account of an officer, when due, the certificate which you have proposed; and, secondly, that when such pay-account thus becomes due the officer may be authorized to transfer it, complying in other respects with the regulation as to the transfer of pay-accounts when pay is due.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

HIRE OF BUILDINGS.

The hire of a building to be used as an office by the officer assigned to the duty of taking charge of the construction of the State, War, and Navy Department building, &c., is in violation of the act of March 3, 1877, chap. 106, which prohibits the renting of any building, or part of any building, for Government purposes in the District of Columbia, "until an appropriation therefor shall have been made in terms by Congress."

Hire of Buildings.

DEPARTMENT OF JUSTICE,

May 18, 1877.

SIR: In reply to the letter of Lieutenant-Colonel Casey, addressed to Brigadier-General Humphreys, of date the 10th instant, referred to me by your indorsement of the 11th, I have the honor respectfully to say:

It appears that by your order Colonel Casey was assigned to the duty of taking charge of the public buildings and grounds, of the Washington Aqueduct, and of the construction of the State, War, and Navy Department building; that after assuming the control of these works he found that the offices used for these purposes were insufficient in size, inconveniently situated, and at a distance from his duties as an officer of the Engineers under charge of certain divisions of the Engineer Department. Under these circumstances, with your authority and that of the Chief of Engineers, he rented for the office of the State, War, and Navy Department building and public buildings and grounds a certain building which he now occupies. This was done by him in ignorance of the statute of March 3, 1877, chapter 106, which was not then brought to his attention; and he now requests information whether the use of this building for the purposes stated is in violation of the clause of the act above referred to, which is as follows: "And hereafter no contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and that this clause be regarded as notice to all contractors or lessors of any such building or any part of any building."

I am of opinion that the hire of the building referred to is in violation of this clause, which is extremely explicit in its terms. The care of the public buildings and grounds, and the oversight of the expenditure for the construction of the State, War, and Navy Department building, are duties devolved upon the Secretary of War as a part of those of his office. Of course they cannot be discharged by him personally, but must be performed by officers acting under his general supervision, whom he details for that purpose. It is a

Hire of Buildings.

purpose of the Government that these duties shall be discharged by him, and it is contemplated that the accommodations which have been put at his disposal will be sufficient to enable him to perform them, and no appropriation having been made in terms for the rent of any building, or of any additional building, that expenditure cannot properly be incurred. While it is true, as stated by Colonel Casey, that all the works under the War Department requiring engineering supervision must be supplied with offices where planning, consultations, and drafting can be carried on, yet when a duty of this character is devolved upon the Secretary of War, and no appropriation is made for the hire of an additional building, it must be considered that Congress has determined that the accommodations now at his disposal are sufficient. While such buildings are a part of the appliances required in the construction of the works, and might properly be charged to the appropriation for those works if they were required where accommodations had not been provided by the Government to the officer to whom their expenditure was intrusted, yet where such accommodations are provided, it cannot be held that additional ones may be hired because those provided are inconvenient or insufficient in the judgment of those who are to conduct the business. It must be held that Congress, in directing that no building should be hired to be used for the purposes of the Government until an appropriation therefor shall have been made in terms, has determined otherwise.

The law we have been considering is a re-enactment of a former law of the United States, (Stat. of 1874, chap. 388,) and the legislative power has most strongly indicated its intention that no building should be rented, not actually in use by the Government, until an appropriation therefor shall have been made in terms.

I am therefore of opinion that Colonel Casey must conduct the work which you have intrusted to him with such accommodations as you may be able to furnish him with in the buildings now belonging to the United States or rented by it.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

Allowances to District Attorneys.

ALLOWANCES TO DISTRICT ATTORNEYS.

In determining the allowances which a district attorney should receive under section 827 Rev. Stats., as compensation for appearing by direction of the Secretary of the Treasury, or of the Solicitor of the Treasury, in suits against officers of the United States for acts done by them, or for the recovery of money received by them and paid into the Treasury, the Secretary of the Treasury may, in his discretion, properly consider what compensation such attorney otherwise annually receives from the Government, and limit the amount to be received by him for the services mentioned, including what he thus otherwise receives, to a sum not exceeding \$10,000 per annum.

DEPARTMENT OF JUSTICE,

May 18, 1877.

SIR: In answer to your letter of the 2d instant, inquiring whether you have the discretionary power to limit the compensation of a district attorney who may appear by your direction, or that of the Solicitor of the Treasury, in any suit against an officer of the Government for any act done by him, or for the recovery of money received by him and paid into the Treasury, I have the honor to reply:

The allowance to be made to a district attorney in suits in which he appears by such direction is subject to your discretion. This allowance is made by virtue of section 827 of the Revised Statutes. It is not included within the emolument returns of the officer of fees received by him in the appropriate exercise of his office.

But in considering the amount which he shall receive for services in suits of the description referred to, it is entirely proper to consider what compensation he receives in other respects from the United States. If a large compensation is received, (to the extent of \$6,000, which is the maximum allowed by law,) it is proper that that should be taken into consideration by you.

In such case it will appear that in the services which are included in the emolument return he will ordinarily have been aided by assistants, and that, therefore, if the service rendered to your Department taken alone should not be adequately compensated, yet the full compensation received by the officer will, according to the scale of salaries that exists

Traders at Military Posts.

in the United States, be sufficient and proper. Although the inquiry whether this would be proper and judicious upon your part is not strictly a legal one, still I have no hesitation in saying that it seems to me a just and proper exercise of your discretion to limit the amount to be received by a district attorney, including that which is received for services strictly within his official capacity, to a sum not exceeding \$10,000.

While a certificate of court is required as to what would be a proper allowance in those cases where suits are brought, yet the law contemplates in addition the approval of the Secretary of the Treasury, which may be made with reference to other compensation received by the officer.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

TRADERS AT MILITARY POSTS.

A post-trader appointed for a military post under section 3 of the act of July 24, 1876, chap. 226, is removable at the pleasure of the Secretary of War.

Such trader is simply a person licensed by the Secretary of War, with the concurrence of the council of administration and commanding officer, to carry on a certain traffic at a military post; and his removal would consist merely in a revocation of the license by the Secretary, in which the concurrence of the council of administration and commanding officer of the post is not required.

DEPARTMENT OF JUSTICE,

May 19, 1877.

SIR: In answer to your letter of the 14th instant, making inquiry whether, under a proper construction of section 3 of "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1877, and for other purposes," approved July 24, 1876, the Secretary of War has power at his own pleasure to remove a post-trader; and, if not, whether he can remove him for cause, and be the sole judge as to what is sufficient cause; and, further, whether the council of administration and the commanding officer, or

Traders at Military Posts.

either or both, must concur in the removal as well as in the appointment, I have the honor to say:

The position of post-trader is not, in my opinion, to be termed an office, nor is the person holding it an official of the Government. He is simply a person having a license from the Secretary of War to carry on at a military post of the United States a certain trade.

From the nature of the case, it seems to me that this license must be revocable by the Secretary of War alone, although, in order that he may grant it, he must have the concurrence of the council of administration and the commanding officer. If this were otherwise, he would necessarily be deprived of a very important right to control the proper conduct of the military posts of the United States.

A brief examination of the statutes upon this subject will, I think, confirm the view which I have taken of the character of the appointment and of the right of the Secretary in regard to removal.

The position of sutler in the Army has been recognized as that of an official. By section 25 of the act of July 28, 1866, (14 Stat., 336,) the office was abolished, but it was directed that the act should not take effect until the year thereafter, undoubtedly in order that the persons who were conducting this business might be enabled in the meantime to dispose of the stores which they had accumulated.

By resolution of March 30, 1867, it was provided that the Commanding General of the Army might permit a trading establishment to be maintained after the 1st day of July of that year at any military post on the frontier within certain defined limits, when such establishment was needed, in his opinion, for the accommodation of emigrants, freighters, and other citizens.

This resolution was repealed by the act of July 15, 1870, which is found in the Revised Statutes, section 1113, by which the Secretary of War was authorized to permit one or more trading establishments to be maintained at any military post on the frontier, not in the vicinity of any city or town, when he believed that such establishment was needed for the accommodation of emigrants, freighters, and other citizens, the

Delegate to Congress—Government Contract.

persons to maintain such establishments to be appointed by him and to be under protection and control as camp-followers.

It is quite clear that under this statute the whole subject was in the control of the Secretary of War.

There was no additional legislation until the statute of July 24, 1876, by which it was provided that every military post might have one trader, to be appointed by the Secretary of War on the recommendation of the council of administration, approved by the commanding officer, who shall be subject in all respects to the rules and regulations for the government of the Army.

The only change intended to be made by this statute was in regard to the mode of appointment. But the Secretary of War was not deprived of his right to remove the party thus appointed at any time he thought fit. Such removal would consist merely in revoking the license, and in such revocation the Secretary is to be guided solely by his own discretion, although, in order to make a new appointment, the concurrence of the council of administration and the commanding officer is required.

In direct answer to your inquiries, I am, therefore, of opinion that the Secretary of War has power at his own pleasure to remove a post-trader. If so, he may, of course, do so for cause, and without the concurrence of the council of administration and the commanding officer.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,

Secretary of War.

DELEGATE TO CONGRESS—GOVERNMENT CONTRACT.

In June, 1876, R. entered into a contract with the Quartermaster's Department for the fiscal year ending June 30, 1877. He was afterwards (in the fall of 1876) elected a Delegate to the Forty-fifth Congress. That Congress not having as yet (in May, 1877,) met, and R. not being as yet a member of that body: *Held* that the provisions of sections 3739 and 3741 Revised Statutes have no application to him. Whether, if the Congress should meet, and R. should be sworn in as a Delegate during the continuance of his contract, the latter would thereby be annulled, is not considered.

Delegate to Congress—Government Contract.

DEPARTMENT OF JUSTICE,

May 19, 1877.

SIR: In answer to your letter of the 14th instant, inquiring whether Mr. Romero, a contractor with the United States, has a right to hold or enjoy any part of his several agreements, or whether the same should be annulled under sections 3739 and 3741 of the Revised Statutes, I have the honor to say:

Mr. Romero, on the 23d of June, 1876, entered into a contract with the quartermaster, department of the Missouri, during the present fiscal year. After making the contract, he was, in the fall of 1876, elected as Delegate to the Forty-fifth Congress. But he has not yet been sworn in, nor is it known that there will be any session of that Congress until after the expiration of the present fiscal year.

The section (3739) referred to provides that no Member or Delegate to Congress shall be directly or indirectly interested in any contract or agreement made or entered into on behalf of the United States, and further provides that all contracts or agreements made in violation of it shall be void. Section 3741 provides that there shall be in every contract or agreement made or entered into on behalf of the United States an express condition that no member of Congress has any interest therein.

In my opinion these sections have now no application to the contract made with Mr. Romero. Although it is understood that he has been elected a Delegate to the Forty-fifth Congress, yet that Congress has never met; and as it is the judge of its own elections, when it meets it may not accept Mr. Romero as a member, so that he may not be able to obtain his seat therein. Neither, if it should recognize his election, will he become a member until he accepts the duties of the office and takes the appropriate oath. Until this event occurs, the legislation referred to has no application to him.

The point involved in your inquiry is quite distinctly decided in an opinion of one of my predecessors, where it was held that a Representative-elect did not become a member of the House within the meaning of section 6, article I, of the Constitution of the United States, until he was sworn in as

Government Advertisements.

such, and therefore that he might until that time lawfully hold office under the government. (14 Opin., 406.)

The question whether, if Mr. Romero had actually accepted the position of a Delegate to the Congress of the United States, and had been sworn in as such, a contract made by him previous to his election would be invalidated, is not presented in your inquiry.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

GOVERNMENT ADVERTISEMENTS.

Sections 853 and 854 Rev. Stat. (though modified by a *proviso* in the act of March 3, 1875, chap. 128, with respect to the advertisement of certain mail lettings) are still in force, without modification, with respect to advertising of the Treasury Department. Opinion of August 14, 1876, reaffirmed.

DEPARTMENT OF JUSTICE,
May 21, 1880.

SIR: In answer to your letter of the 17th instant, inquiring whether the provisions of sections 853 and 854 of the Revised Statutes are still in force or have been in any way modified, I have the honor respectfully to say:

The only modification of these sections is by a proviso in the appropriation act of March 3, 1875, by which it was enacted that thereafter the mail-lettings for the States of Maryland and Virginia and for the District of Columbia should be advertised in not more than one newspaper published in the District of Columbia, and at prices satisfactory to the Postmaster-General, not exceeding the customary rates paid in the city of Washington for ordinary commercial advertisements; and that so much of section 3826 of the Revised Statutes as refers to the publication of advertisements in newspapers was thereby repealed.

Whether by this legislation any right was given to the Postmaster-General to contract for advertising in the cases specified at rates exceeding those prescribed by sections 853

Allowances on Coast-Survey Service.

and 854 of the Revised Statutes, I do not understand to be included in your inquiry. Such proviso obviously has no reference to the advertising of the Treasury Department. So far as that Department is concerned, I consider that those sections are still in force, and that they have not been in any way modified.

In this connection I have examined the opinion of the 14th of August, 1876, (inclosed with your communication,) which was addressed to the Secretary of the Interior by the Solicitor General, with the approval of my predecessor, the Hon. Alphonso Taft. I think its conclusions are correct, and have no reason in any respect to change them.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

ALLOWANCES ON COAST-SURVEY SERVICE.

The additional allowances for subsistence provided for by section 4688 Rev. Stat. can legally be made to officers of the Army or Navy while employed on coast-survey service. Such allowances are not within the prohibition made by the final clause of section 4684 Rev. Stat.

DEPARTMENT OF JUSTICE,
May 23, 1877.

SIR: In answer to your letter of the 19th instant, received on the 22d, inquiring whether the additional allowances for subsistence provided by section 4688 of the Revised Statutes can legally be made to officers of the Army and Navy while employed on coast-survey service, in view of an apparent conflict between that section and the final clause of section 4684, which provides that "no officer of the Army or Navy shall receive any extra pay out of any appropriations for surveys," I have the honor to say:

The provision which is embodied in section 4684 was transferred to the Revised Statutes from a statute of March 3 1843, and the provision which is found in section 4688 was transferred from a statute of June 12, 1858.

Removal of Obstruction to Navigation.

If there were any conflict between these two sections, in view of the fact that the provision found in section 4688 was passed subsequently to that which is found in section 4684, it must be considered that, in so far as it conflicts with section 4684, section 4688 is to prevail.

The subsequent statute to that extent would limit and control the previous one. Upon examination, however, I am of opinion that there is no real conflict between the provisions of the two sections. The distinction which exists between the pay proper of an officer of the Army or Navy and the allowances which are made to him for transportation, subsistence, quarters, &c., is one well understood and recognized. By the final clause of section 4684 it is provided that "no officer of the Army or Navy shall receive any extra pay out of any appropriations for surveys." As used in this section, the word "pay" refers to the pay proper of the officer. Such a provision is in no way inconsistent with another provision, that he may receive a certain allowance for his subsistence in addition to his compensation, not exceeding the sum authorized by the Treasury Regulations of May 11, 1844. This provision contemplates that the additional allowance thus made is something different from his compensation or pay as an officer.

I am therefore of opinion that the additional allowances for subsistence provided for by section 4688 can legally be made to officers of the Army or Navy while employed on coast-survey service.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

REMOVAL OF OBSTRUCTION TO NAVIGATION.

Congress having made an appropriation for the improvement of the Connecticut River, to be expended under the direction of the Secretary of War, the latter has power, under this legislation, to remove a wrecked vessel lying in that river, without waiting until it is abandoned, if in his judgment it constitutes an obstruction to navigation.

Removal of Obstruction to Navigation.

DEPARTMENT OF JUSTICE,

May 24, 1877.

SIR: In your communication of the 21st instant you inform me that the schooner E. F. Meany was wrecked on Saybrook Bar, at the mouth of the Connecticut River, and that this wreck now constitutes an obstruction to the navigation of that river, and inquire whether the United States can legally proceed with its removal at once, without waiting until it is abandoned by the owners or claimants, it having been purchased by Scott and Pascall, of New London, Conn.

I have the honor to reply that, by statute of August 14, 1876, an appropriation was made for the improvement of Connecticut River below Hartford, Conn., of the sum of \$20,000, which was to be expended under the direction of the Secretary of War.

If this wreck constitutes an obstruction to navigation, under the authority thus given to the Secretary it may be removed, notwithstanding it is private property. The right of Congress to keep open and free from any obstruction navigable rivers, and to remove such obstructions when they exist, is well settled. (*Gilman vs. Philadelphia*, 3 Wall., 713.) While all citizens have a right to pass and repass over the navigable waters of the United States, they cannot claim that the beds of these streams should be used as places of deposit of their private property, whether so left by them intentionally or there wrecked by accident. Of course, due consideration will be given by the Department to the rights of private property-owners, and an opportunity offered to them to remove such obstructions, if they will do so with reasonable rapidity. Such opportunity has apparently been fully given in the present case, and if the wreck in question now forms in the opinion of the Secretary, an obstruction to the navigation of the Connecticut River, he may properly remove it therefrom.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

Compensation of Customs Officers.

COMPENSATION OF CUSTOMS OFFICERS.

There is no authority of law for the appointment of a deputy collector, deputy naval officer, and deputy surveyor at the port of New York without compensation, and then appointing such officers clerks at a larger compensation than that affixed by law to the positions of deputy collector, deputy naval officer, and deputy surveyor at that port.

The Secretary of the Treasury cannot, under section 2634 Rev. Stat., give to officers whose compensation is fixed by law a compensation which shall be regulated by his own discretion.

DEPARTMENT OF JUSTICE,

June 4, 1877.

SIR: By your letter of the 23d ultimo I am informed that the Treasury Department, in the year 1873, authorized the appointment of a chief deputy collector, chief deputy naval officer, and chief deputy surveyor at the port of New York, without compensation, and also, under sections of law which are reproduced in section 2634 of the Revised Statutes, appointed them clerks at a compensation of \$5,000 each per annum.

You request to be informed whether these appointments, and the salaries paid thereunder, are in accordance with the law, in view of the provisions of sections 2697, 2705, and 2722 of the Revised Statutes and the general provisions of law relating to the salaries of clerks in custom-houses.

In answer to your inquiry I have the honor respectfully to say:

By the sections 2697, 2705, and 2722, Congress has definitely fixed the salaries which it deemed appropriate for the officers performing the duties at the port of New York of deputy collectors, deputy naval officers, and deputy surveyors. Having so done, the salaries which they should receive for the performance of such services should be regulated by a distinct regard to such provisions. It is not in accordance with the intent of the law to appoint officers to such positions without compensation, and then, under a provision of law intended to enable the Secretary of the Treasury from time to time, as necessity might require, to limit and fix the number and compensation of other officers, to attach to the fixed and permanent deputies salaries appropriate to such other officers. The number of clerks employed from time to time at the various custom-houses necessarily changes with the business of

Compensation of Customs Officers.

each year, and a discretionary power was probably thought necessary by Congress to be given to the Secretary of the Treasury, in order that he might adapt the force to the exigencies of each particular year; but it would not be a correct construction of section 2634 to interpret it as authorizing the Secretary to give to permanent officers whose compensation had been determined by law a compensation which should be regulated by his own discretion. It was undoubtedly contemplated by law that salaries given for clerical labor would usually be inferior in amount to those of subordinate officers of a grade as high as that of the immediate deputies to the heads of the officers of the department of customs at New York. Section 2745 provides: "The compensation of clerks, verifiers, samplers, openers, packers, and messengers at the port of New York shall be limited and fixed by the Secretary of the Treasury, but shall not exceed the rates of compensation usually paid for similar services." It would therefore not be appropriate to pay to a person appointed only as clerk a salary which would be appropriate for a superior officer.

Of course the opinion I give is limited to your inquiry in reference to the port of New York, as section 2634 contemplates that where no compensation has been fixed for the deputy of any collector, naval officer, or surveyor, such compensation may be fixed by the Secretary of the Treasury.

In direct answer to your inquiry, therefore, I am of opinion that appointments of officers to perform the duties of deputy collectors, deputy naval officers, and deputy surveyors, with the title and powers of those officers, where definite salaries are given by law, should not be made without compensation, and such officers then be appointed clerks at a larger compensation than that affixed by law to the positions to which they were appointed. Having been appointed deputy collectors, deputy naval officers, or deputy surveyors, they are entitled to receive the compensation which Congress has fixed as appropriate to those positions, and they are not entitled to receive any other by affixing to them a different or additional name.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Checks of Disbursing Officers.

CHECKS OF DISBURSING OFFICERS.

Under section 3620 Rev. Stat., as amended by act of February 27, 1877, chap. 69, the Treasurers and Assistant Treasurers of the United States may be authorized to pay the checks of disbursing officers, where the same are drawn in favor of the persons to whom payment is made, but are payable to order or bearer. Whether such checks shall be made payable only to the persons entitled to payment, or to bearer, or to order, is a matter to be regulated entirely by the discretion of the Secretary of the Treasury.

DEPARTMENT OF JUSTICE,
June 4, 1877.

SIR: In answer to your letter of May 28, 1877, inquiring whether the Treasurer or any Assistant Treasurer of the United States is authorized to pay the check of a public disbursing officer drawn upon him, if drawn in favor of the party by name to whom the payment is to be made, but made payable to order or bearer, I have the honor to reply:

Under the provisions of the first section of the act of March 3, 1857, chap. 114, (11 Stat., 249,) each and every disbursing officer or agent of the United States, having any money intrusted to him for disbursement, was required to deposit the same with the treasurer of the United States or with some one of the assistant Treasurers or public depositaries, and to draw for the same only in favor of the persons to whom payment was to be made, in pursuance of law and instructions, except when payments were to be made in sums under \$20. In the latter case the agent could draw in his own name, stating that it was to pay small claims. By the act of June 14, 1866, the Secretary of the Treasury might, when he deemed it essential to the public interests, specially authorize in writing the deposit of such public money in any other public depositary, or in writing authorize the same to be kept in any other manner, and under such rules and regulations as he might deem most safe and effectual to facilitate the payments to public creditors.

The acts of March 3, 1857, and June 4, 1856, were amendatory of the act of August 6, 1846, familiarly known as the sub-treasury act; the object of which was to secure the safe-

Checks of Disbursing Officers.

keeping of the public funds committed to disbursing officers while any balance remained unexpended.

The provisions of the act of 1857 are reproduced in sections 3621, 3639, 5489, and 5492 of the Revised Statutes, with the exception of the first section, which is entirely omitted. Of the act of 1866, all the sections are reproduced in sections 3620, 5488, and 5497 of the revision.

Apparently this omission thus to reproduce the first section of the act of 1857 has been deemed by Congress to have been an inadvertence. By the act approved February 27, 1877, entitled "An act to perfect the revision of the statutes of the United States and of the statutes relating to the District of Columbia," section 3620 Revised Statutes is amended by inserting a clause requiring the checks to be drawn only in favor of the persons to whom payment is to be made. This amendment restores the law in this respect to the condition in which it was before the revision of the statutes. The immediate object of this provision is that the books or vouchers of the assistant treasurers of the United States, public depositaries, or other persons or institutions with whom the disbursing officer might be authorized by the Secretary of the Treasury to deposit the public moneys, should show upon whose account and upon what claims or demands such moneys were paid out by the check of the disbursing officer. These checks would thus, when compared with the vouchers of the disbursing officer, tend to show in what mode the public moneys had been disposed of by him, and would afford a means of testing the accuracy of his accounts.

If the evidence of the claim upon which the public money is paid is afforded by the check, all that is required by law has been complied with. Whether such checks shall be made payable only to the person entitled to the money, or to "bearer," or to "order," is a matter to be regulated entirely by the discretion of the Treasury Department. If a check is made payable to bearer, of course the person receiving it is exposed to the danger that if it is lost or stolen from him it may be drawn by some dishonest person. If made payable to order, the United States officer who is called upon to pay it is exposed to the danger of being deceived by a forged indorsement. These and other similar suggestions are those

Approval of Court-Martial Sentence.

of administrative expediency only, for the consideration of the Secretary of the Treasury in determining in what form, or whether in all of these various forms, he will permit the checks to be drawn. The only imperative requisition is that the check shall be drawn only in favor of the persons to whom the payment of the disbursing officer is to be made. If thus drawn, whether the words "or order" "or bearer" are added or omitted, the check affords all the information intended to be conveyed by it.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

APPROVAL OF COURT-MARTIAL SENTENCE.

It is not necessary that the President should attach his sign manual to the approval of a sentence rendered by a court-martial in time of peace, cashiering a commissioned officer, in order to make the sentence effectual. It is sufficient, for this purpose, if his approval of the sentence be signified through and attested by the Secretary of War in a statement signed by the latter.

Paragraph 896 of the regulations of the Army does not apply to proceedings of courts-martial which require the decision of the President. It is applicable only to those proceedings which may be confirmed by the officer who ordered the court to assemble or the commanding officer for the time being, as the case may be.

The action of the President in matters relating to the Army which require his approval and direction may, in general, be signified through and authenticated by the head of the Department of War. Where the latter acts in such matters, he acts, in contemplation of law, under the direction of the President, and is to be regarded as the mere organ of the Executive will.

This principle has been long and frequently acted upon in making known the will or determination of the President in cases of sentences of courts-martial required to be laid before him for confirmation or disapproval.

A statement made and signed by the Secretary of War, announcing the approval by the President of a court-martial sentence, is a sufficient authentication of the act of the President, without an express averment therein that it is made by direction of the President; the presumption being always that such direction was given.

An act of the President remitting part of a court-martial sentence may be authenticated in the same way in which his act confirming such sen-

Approval of Court-Martial Sentence.

tence can be authenticated. Where partial remission is made at the time of confirmation, the two acts are, in practice, signified and attested together in the same way.

When the sentence of a court-martial, lawfully confirmed, has been executed, the proceedings in the case are no longer subject to review by the President.

DEPARTMENT OF JUSTICE,

June 6, 1877.

SIR: I have considered the questions which you were pleased to refer to me in your letter of the 24th of April last, arising upon the record of the confirmation of the court-martial proceedings against Major Benjamin P. Runkle, a retired officer. Delay has occurred in my reply, owing to the fact that the counsel of Major Runkle, who desired to be heard on the subject, did not complete his argument until the 31st ultimo.

It appears that the court-martial which tried Major Runkle sentenced him to be cashiered, to pay a large fine, and to be confined in the penitentiary. The sentence was confirmed by the late President; who, however, remitted all of the penalty imposed except so much as cashiered the officer. But the action of the President was not made known by any statement signed by himself; it was signified through the then Secretary of War, Mr. Belknap, by a statement signed by the latter. Major Runkle denies the sufficiency of the confirmation, as thus authenticated, to make the sentence effectual.

The first and principal inquiry is, "Is it necessary for the President to attach his *sign manual* to the approval of the record of a court-martial cashiering a commissioned officer from the military service in time of peace? Or is the Secretary of War authorized by statute to review and approve such sentence?"

The sixty-fifth article of war, (contained in the act of April 10, 1806,) which was in force when the proceedings against Major Runkle took place, provides that no sentence of a court-martial in time of peace, extending to the dismissal of a commissioned officer, shall be carried into execution "until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval

Approval of Court-Martial Sentence.

and orders in the case." In this connection I may observe that, in so far as it relates to a sentence of dismissal of a commissioned officer, that article has been superseded by the one hundred and sixth article of war, contained in the Revised Statutes. (See page 239.) The latter article, however, makes no change in the law. It reads: "In time of peace no sentence of a court-martial directing the dismissal of an officer shall be carried into execution until it shall have been confirmed by the President."

The above-mentioned article 65 is the only statutory provision which gave authority to confirm, and thus render effectual, the sentence of a court-martial dismissing a commissioned officer in time of peace, at the period of the confirmation of the sentence in Major Runkle's case; and it is clear that such authority was conferred upon the President alone. Accordingly, the last clause of the above inquiry, in which it is asked whether the Secretary of War may "review and approve" such a sentence, must be answered in the negative.

The other branch of the inquiry involves simply this point: When the President exercises the authority to confirm a sentence of dismissal, in a case laid before him, must he attest his determination by signing a written statement thereof, in order that the confirmation of the sentence shall have effect? The statute being silent on the subject, the answer depends upon whether his determination in the case may not be otherwise lawfully authenticated.

It is urged by counsel in behalf of Major Runkle that the President is required, by paragraph 896 of the Army Regulations, to affix his signature to the statement of his decision. That paragraph provides: "The judge-advocate shall transmit the proceedings, without delay, to the officer having authority to confirm the sentence, who shall state, at the end of the proceedings in each case, his decision and orders thereon." But it is evident, from the next paragraph of the regulations, that the paragraph just quoted was not meant to apply to proceedings which require the decision of the President under the sixty-fifth article of war; for, as to such proceedings, paragraph 897 contains a special provision, directing them to be addressed to "the Adjutant-General of the Army, War Department." This provision shows that

Approval of Court-Martial Sentence.

paragraph 896 was intended to embrace proceedings other than those requiring the decision of the President, namely, proceedings which may be confirmed by the officer who ordered the court to assemble, or the commanding officer for the time being, as the case may be.

By the law establishing the War Department, the Secretary of War is required to perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to the military forces or to matters respecting military affairs, and to conduct the business of the Department in such manner as the President shall direct. (See act of August 7, 1789, Rev. Stat., sec. 216.) And in the case of the *United States vs. Eliason*, the Supreme Court of the United States lays down this doctrine: "The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and the rules and orders publicly promulgated through him must be received as the acts of the Executive, and, as such, be binding upon all within the sphere of his legal and constitutional authority." (16 Pet., 302.) See also the earlier case of *Wilcox vs. Jackson*. (13 Pet., 513.)

From these cases, and the law referred to, the following principle is deducible: that the action of the President, in matters relating to the Army which require his approval and direction, may in general be signified through and authenticated by the head of the Department of War; and that where the latter acts in such matters, he, in contemplation of law, acts under the direction of the President, and is to be regarded as the mere organ of the Executive will.

That principle has indeed been frequently acted upon in making known the will or determination of the President in cases arising in that and other Departments, wherein his judgment or discretion was to be exercised, from the very beginning of the government, (see the opinion of Attorney-General Cushing of August 31, 1855, 7 Opin., 453, in which the subject is elaborately and learnedly treated;) and among the different classes of cases in which it has been acted upon is that of sentences of courts-martial required to be laid before him for confirmation or disapproval.

In the class of cases just adverted to, though the determi-

Approval of Court-Martial Sentence.

nation of the President has often been attested by his own signature to the paper announcing it, it has quite as often, I learn on careful inquiry, been attested by a written statement made and signed by the Secretary of War.

It is remarked by Major Runkle's counsel, in a printed argument filed with the papers, that "all of our earlier Presidents signed the approval of such sentences, and it is believed that it was only during the last administration that the contrary practice prevailed."

But I have before me several instances of the "contrary practice," happening prior to 1860, one of which occurred nearly half a century ago.

Thus, in the case of First Lieut. William S. Colquhoun, Seventh Infantry, who was tried by court-martial and sentenced to be cashiered in 1829, the determination of the President (which confirmed the sentence, except as to the disqualification from thereafter holding any office in the Army) was signified through the Secretary of War, Mr. Eaton, in a statement signed by the latter purporting to be made "by command of the President."

So, in the case of First Lieut. R. M. Cochrane, Fourth Infantry, who in 1844 was sentenced to be cashiered by a court-martial, the determination of the President, confirming the sentence, was signified through the Secretary of War, Mr. Wilkins. Here the latter made known the action of the President by indorsing upon the record of the proceedings and signing the following brief statement: "The proceedings, finding, and sentence of the court are approved. November 28, 1844."

So in the case of Maj. George B. Crittenden, Mounted Riflemen, who was sentenced to be cashiered by a court-martial in 1848, the determination of the President, confirming the sentence, was announced through the Secretary of War, Mr. Marcy, by a statement indorsed upon the record and signed by the latter, which reads thus: "The President approves of the proceedings and sentence in the case of Major Crittenden, and directs the proper order to be issued thereon."

So in the case of Brevet Lieut. Col. William R. Montgomery, major Second Infantry, who in 1855 was sentenced by a

Approval of Court-Martial Sentence.

court-martial to be dismissed the service, the determination of the President, confirming the sentence, was in like manner signified through the Secretary of War, Mr. Davis.

So in the case of First Lieut. John N. Perkins, First Cavalry, who in 1859 was sentenced by a court-martial to be cashiered, the action of the President, confirming the sentence, was in like manner signified through the Secretary of War, Mr. Floyd.

I am informed by inquiry at the office of the Judge-Advocate General that numerous instances have occurred since the case last mentioned, in which the determination of the President, confirming sentences of dismissal by courts-martial, has been signified and attested in the same way. As, however, the argument for Major Runkle concedes the prevalence of the practice during this recent period, I have thought it unnecessary to carry the investigation further or to set forth particular instances occurring during the same period.

Where the law does not prescribe any formality for the attestation of a particular act of the President, a mode of attesting such an act which has been sanctioned by long usage may well be deemed to be a sufficient compliance with the law authorizing the performance of the act. In the case of the confirmation of a sentence of dismissal by a court-martial, no formality appears to be prescribed by law for attesting the determination of the President; and as, in cases of that sort, the attestation of such determination by a written statement, signed by the Secretary of War, is in accordance with long usage, that mode of attesting the President's action, confirming a sentence of dismissal, is to be considered as sufficient. To require the sign-manual of the President at this day, in order to give effect to the confirmations of such sentences made in that mode by your predecessors, would produce a confusion far more mischievous than the imaginary grievance resulting from the omission of the use of that sign-manual.

In reply, then, to the question under consideration, I answer that, in my opinion, it is not necessary for the President to attach his sign-manual to the approval of the sentence of a court-martial cashiering a commissioned officer in time of peace. To make the sentence effectual, it is sufficient if

Approval of Court-Martial Sentence.

his approval of the same be signified through and attested by the Secretary of War in a statement signed by the latter. Here the Secretary is not to be regarded as pronouncing his own judgment upon the case; he acts merely as an organ for communicating and authenticating the determination of the President.

With respect to the statement made by the Secretary of War in Major Runkle's case, announcing the approval of the sentence, it is objected that such approval is not therein averred to be by direction of the President, though the statement concludes thus: "The President is pleased to remit all of the sentence, except so much thereof as directs cashiering, which will be duly executed." The necessary inference from the language just quoted is, that the proceedings were actually before the President, and that he confirmed the sentence. But this the law would presume independently of the language referred to. Thus it was the duty of the Secretary, in the first place, to lay the proceedings before the President, and a presumption arises in favor of the performance of the duty. So the direction of the President is to be presumed in all orders or instructions issuing from the proper Department, which, to be operative, require such direction. (13 Opin., 5.) In the case of Lieutenant Cochrane, cited above, the statement made by the Secretary of War, announcing the approval of the sentence, contains no express reference to the direction of the President; yet such direction must be presumed to have been given.

The next inquiry is, "When a commissioned officer of the Army is sentenced by a court-martial to pay a fine, to be imprisoned in a penitentiary, and to be cashiered the service, and in the review of the case the sentence is approved, but the fine and imprisonment are remitted, and the sign-manual of the President is not attached, but only that of the Secretary of War, is such approval of any validity; and does the *pardon* of fine and imprisonment therein contained relieve the accused from the consequences of the sentence; and can the President review the record as though it were originally and for the first time before him?"

This inquiry contains three distinct branches, the answer to the first of which (that relating to the approval of the sen-

APPROVAL OF COURT-MARTIAL SENTENCE.

tence) is involved in my answer to your first inquiry. To the second of these branches I reply, that the remission of the fine and imprisonment in the manner stated was legally sufficient to relieve the accused from that portion of the penalty imposed by the sentence. The act of the President remitting part of a court-martial sentence may, as I conceive, be authenticated in the same way in which the authentication of his act confirming such sentence can be done; and where the partial remission is made at the time of the confirmation of the sentence, the two acts are in practice signified and attested in the same way together.

To the remaining branch my answer is, that the sentence in the case referred to having been lawfully confirmed and (except as to the part remitted) carried into execution, the proceedings are not now open to review by the President; they have passed beyond his control, and are at an end.

The last inquiry is, "In view of the opinion of the Judge-Advocate-General in his report of May 3, 1876, relative to the evidence as to Major Runkle's guilt of the crime of embezzlement, and the fact that the approval of the proceedings of the court is signed by the Secretary of War, is the President authorized by the one hundred and sixth article of war to review the record of the court as though it were now originally and for the first time before him?"

I beg to submit, in answer to this inquiry, the concluding portion of my remarks in reply to the one next proceeding.

I have the honor to be, very respectfully,

CHAS. DEVENS.

THE PRESIDENT.

NOTE.—It is thought that some observations may be appropriately made here upon the subject of the authority of the President to appoint general courts-martial in cases other than those in which he is expressly authorized to do so by Congress.

Prior to the act of May 29, 1830, by which was amended the sixty-fifth article of war contained in the act of April 10, 1806, there existed no statute authorizing the President to appoint a general court-martial in any case whatever. That article, indeed, empowered "any general officer commanding an army" to appoint general courts-martial whenever necessary; but the language quoted cannot properly be construed to include the President or Commander-in-Chief of the Army, as in the same article and elsewhere throughout the same statute, where the President is spoken of or referred

Approval of Court-Martial Sentence.

to, he is described by his title of President or Commander-in-Chief, indicating that Congress only meant to include the President in any of the provisions of the statute where he is thus designated by his official title. Yet it appears that the authority to constitute courts of that kind was theretofore exercised a number of times by the President through the medium of the Secretary of War. And since the passage of the act of 1830, which provided for the appointment of such courts by the President in certain cases only, the same authority has been frequently exercised by him in like manner in cases not within that statute. The authority to constitute general courts-martial being thus, at widely different periods and on frequent occasions, exercised by the President in the absence of any statutory provision conferring it, the inference is that such authority was deemed by the then incumbents of the office to be derivable from the only other source which could impart it, namely, the Constitution.

By section 2, article 2, of the Constitution it is declared: "The President shall be commander-in-chief of the Army," &c. What the functions of the commander-in-chief are the Constitution does not define. These can only be determined by resort to the law and usage of our military service which prevailed at the time of its adoption.

During the war of the Revolution, in which the military service of the United States had its beginning, General Washington, as commander-in-chief of the American forces, appointed general courts-martial, with the tacit sanction of Congress and the acquiescence of the Army. With the tacit sanction of Congress, it can well be said, for the power to constitute these courts was never formally or specifically conferred upon him by that body, though his commission was, by the comprehensive terms in which the trusts and duties of the office are therein described, broad enough to include this power. He was, among other things, thereby required to cause "strict discipline and order to be observed in the Army," regulating his conduct in every respect by the rules and articles of war enacted by Congress. These rules and articles, as originally adopted, (see Journals of Congress, under date of June 30, 1775,) whilst they contained provisions relating to the organization and jurisdiction of general courts-martial, prescribed no mode for constituting such courts, gave no one authority to order them, or to appoint the members thereof. By resolution passed April 14, 1777, Congress provided that "the Continental general, commanding in either of the American States for the time being, shall have full power of appointing general courts-martial, to be held." No further legislation took place in regard to the constitution of these courts until the year 1786.

Before the adoption of the resolution of 1777, the Commander-in-Chief, by virtue and in execution of the functions appertaining to his office, frequently appointed general courts-martial. (See Am. Archives, 5th series, vol. 2, pp. 467, 498, 610, 1242.) That resolution first introduced into the Rules and Articles of War a provision granting power to appoint such courts, and it extended to a single officer only, namely, the "general commanding in either of the American States," who was subordinate to the Commander-in-Chief; but it was not construed as operating to

Approval of Court-Martial Sentence.

exclude the exercise of the same power from the latter, who, in fact, thereafter exercised the same power concurrently with the former.

The state of the military law at this period, touching the appointment of general courts-martial, is further evidenced by a remark made by General Washington in a letter to General Gates, written under date of February 14, 1778. General Washington there observes: "It is a defect in our martial law, from which we often find great inconvenience, that the power of appointing general courts-martial is too limited. I do not find it can be legally exercised by any officer except the Commander-in-Chief, or the commanding general in any particular State." (Writings of Washington, vol. 5, p. 236.)

On the 31st of May, 1786, Congress passed a resolution providing that "general courts-martial shall be ordered, as often as the cases may require, by the general or officer commanding the troops." The power to appoint these courts was thereby granted to officers not previously invested therewith. This became necessary by reason of the condition of the military establishment then existing. At the time of that enactment there was no officer of the rank of commander-in-chief in the military service of the United States. General Washington had resigned his commission in December, 1783, and the Congress of the Confederation made no appointment of a commander-in-chief thereafter. Nor, indeed, was there any officer in the military service of such rank as to fall within the description of a general commanding in any State. And as the law of the military service then stood, the commander-in-chief and the general commanding in any State only were competent to appoint general courts-martial. The resolution of 1786 was cumulative in its character; it made competent, in addition to those who might hold the positions just mentioned and who would be competent by the pre-existing law, any "general or officer commanding the troops;" within which terms a colonel or lieutenant-colonel, for example, would come when commanding the troops.

Such was the law respecting the appointment of general courts-martial at the adoption of our present Constitution; and, accordingly, at this period the power to appoint these courts could have been legally exercised by—

1. A commander-in-chief of the military forces, in virtue of, and as a function belonging to, his office.
2. A general commanding in any State, under the resolution of April 14, 1777.
3. A general or officer commanding the troops, under the resolution of May 31, 1786.

The provisions of the resolutions of 1777 and 1786, adverted to, were along with the other rules and articles of war in force when the Constitution was adopted, continued in force under the new form of government by Congress (see Acts of September 29, 1789, and April 30, 1790) until the passage of the act of April 10, 1806.

As has been already observed, the Constitution, while it declares that the President shall be Commander-in-Chief of the Army, does not define

Approval of Court-Martial Sentence.

the functions of that office, but these are left to be ascertained by reference to the law and usage of our military service as it existed when the Constitution was formed. On examination of the history of this service down to that period, it is found that the Commander-in-Chief, among the duties of whose office, as set forth in his commission, was that of causing "strict discipline and order to be observed in the Army," from time to time exercised authority to appoint general courts-martial without any formal or specific grant of the authority, but nevertheless with the tacit sanction of Congress and the acquiescence of the Army; and thus it became the established law and usage of the military service of the United States for the Commander-in-Chief to exercise such authority. The conclusion to which this directly leads is, that, as Commander-in-Chief of the Army, the President is by the Constitution invested with authority to constitute general courts-martial, and, consequently, can legally exercise such authority without a legislative grant.

This view appears to accord with that which has prevailed in American treatises on courts-martial of respectable authority, and which from an early period down to the present time has also prevailed in the practice of the Government.

Thus, in a work on courts-martial published in 1809 by Maj. Alex. Macomb, of the United States Corps of Engineers, it is said: "All general courts-martial are assembled by the authority of the President of the United States of America, or any general officer commanding an Army, or colonel commanding a separate department. (See page 8.) The author cites the sixty-fifth article of war, contained in the act of April 10, 1806, in support of that part of the above extract which enumerates the general officer and colonel. That article superseded the provisions relating to the appointment of general courts-martial which are contained in the resolutions of 1777 and 1786, hereinbefore mentioned, and which were previously in force. It provided that "Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial whenever necessary."

In 1840 the same author, then a major-general of the United States Army, published a work on the practice of courts-martial, in which the same doctrine is laid down. The second section of this work contains the following: "General courts-martial, in the regular Army, are appointed by the authority of the President of the United States, or that of any general officer commanding an army, or colonel commanding a separate department. (See Articles of War, 65.) But whenever a general officer commanding an army, or colonel commanding a separate department, shall be the accuser or prosecutor of any officer in the Army of the United States under his command, the general court-martial for the trial of such officer shall be appointed by the President of the United States. (See act of 29th of May, 1830.)" In the introduction of this work the author acknowledges himself under great obligations to the Hon. B. F. Butler, then late Attorney-General of the United States, to whose inspection the work in its original form was submitted. "After carefully perusing every paragraph," adds the author, "the Attorney-General made such amend-

APPROVAL OF COURT-MARTIAL SENTENCE.

ments and additions as appeared to him proper, all which have been adopted. It may, therefore, be said that the work has received the general approbation of that high functionary."

In the work of De Hart on Courts-Martial, which first appeared in 1846, it is said: "Independent of this special act" (referring to the act of May 29, 1830) "the President of the United States, being by the Constitution of the country Commander-in-Chief of the Army and Navy of the United States, is competent at all times to appoint general courts-martial." (See page 5.) And further on (see page 6) it is remarked: "A general court-martial, then, can only be appointed or assembled by the commands of the President of the United States, a general officer commanding an army, or a colonel commanding a separate department."

It may be stated, in this connection, that in a report from the Committee on Military Affairs of the House of Representatives, made during the first session of the Twenty-second Congress (in February, 1832), in the case of Lieutenant-Colonel Woolley, it is observed: "The President, as Commander-in-Chief of the Army of the United States, may, in his discretion, order a general court-martial, but this power cannot be exercised by any other officer." (See American State Papers, Military Affairs, vol. 4, p. 854.)

The following are some of the more prominent cases in which general courts-martial have been ordered by the President through the Secretary of War, and which are here cited as illustrative of the practice of the Government:

1. The case of General Hull, who was tried at Albany, N. Y., by a general court-martial convened pursuant to General Order, dated Adjutant and Inspector General's Office, Washington, November 17, 1813, issued by order of the Secretary of War.

2. The case of Major-General Wilkinson, who was tried at Utica, N. Y., by a general court-martial convened pursuant to General Order, dated at the same office, Washington, November 18, 1814, issued by order of the Secretary of War.

3. The case of Major-General Gaines, who was tried in the city of New York by a general court-martial convened pursuant to General Order, dated at the same office, Washington, May 22, 1816, issued by order of the Secretary of War.

It is to be observed that the courts-martial in the three cases just mentioned were ordered long before the act of May 29, 1830, (which provided for the appointment of such courts by the President in certain cases only,) and at a period when no *statutory* provision existed conferring upon him power to appoint them in any case. In all the cases which follow, the courts-martial were ordered after the passage of that act; but these cases not being such as that act provided for, the courts-martial so ordered must be regarded as not appointed by virtue of any authority conferred thereby.

4. The case of Maj. George B. Crittenden, who was tried by a general court-martial convened at Oregon City, Oregon, pursuant to General

Approval of Court-Martial Sentence.

Orders No. 5, dated War Department, February 22, 1850, issued by order of the Secretary of War.

5. The case of Bvt. Brig. Gen. George Talcott, Colonel of Ordnance, who was tried by a general court-martial convened in the city of Washington, D. C., pursuant to General Orders No. 29, dated War Department, June 10, 1851, issued by direct order of the President.

6. The case of First Lieut. Benjamin McNeill, Third Artillery, who was tried by a general court-martial convened at Fort Adams, R. I., pursuant to General Orders No. 54, dated War Department, November 3, 1851, issued by order of the Secretary of War.

7. The case of Bvt. Lieut. Col. William R. Montgomery, major Second Infantry, who was tried by a general court-martial convened at Fort Leavenworth pursuant to Special Orders No. 134, dated War Department, July 26, 1855, issued by order of the Secretary of War.

8. The case of Bvt. Maj. Gen. David E. Twiggs, who was tried by a general court-martial convened at Newport Barracks, Ky., pursuant to Special Orders No. 42, dated War Department, March 19, 1858, issued by order of the Secretary of War.

9. The case of Maj. Osborne Cross, Quartermaster's Department, who was tried by a general court-martial convened in the city of New York pursuant to Special Orders No. 126, dated War Department, July 11, 1859, issued by order of the Secretary of War.

10. The case of Brig. Gen. George H. Gordon, United States Volunteers, who was tried by a general court-martial convened at Hilton Head, S. C., pursuant to Special Orders No. 83, dated War Department, February 23, 1864, issued by order of the Secretary of War.

11. The case of Surgeon-General Hammond, who was tried by a general court-martial convened at Washington, D. C., pursuant to Special Orders No. 24, dated War Department, January 16, 1864, issued by order of the Secretary of War.

12. The case of Brig. Gen. E. A. Paine, who was tried by a general court-martial convened at Cairo, Ill., pursuant to Special Orders No. 51, dated War Department, February 1, 1865, issued by order of the Secretary of War.

It is deemed unnecessary to cite more recent cases of this sort, of which a number might be mentioned. But there is one (and it is the only one of which the writer is aware) in which the question was raised in behalf of the accused, and considered on review of the proceedings, viz, whether the court, which was appointed by order of the Secretary of War, was thereby legally constituted. The case referred to is that of Maj. B. P. Runkle, who was tried by a general court-martial in 1872, to the proceedings in which the foregoing opinion of the Attorney-General relates. Upon that question Judge-Advocate-General Holt, in an official report on the proceedings made to the Secretary of War under date of December 31, 1872, in which the point is elaborately and ably discussed, gave an affirmative opinion.

The authority of the President to appoint general courts-martial, in cases wherein he is not expressly authorized so to do by Congress, may there-

Checks of Disbursing Officers.

fore be regarded as well established. It rests directly upon the provision of the Constitution which makes him Commander-in-Chief, as interpreted by the law and usage of the military service existing when that instrument was framed; it is sustained by the doctrine laid down in American works of authority on courts-martial, the views expressed by one of the standing committees of the House (that on Military Affairs) whose especial business it is to make itself conversant with subjects of this character, and an official opinion of the late distinguished head of the Bureau of Military Justice, Judge Holt; and, moreover, it is confirmed by long-continued practice, extending back nearly to the beginning of the Government.

CHECKS OF DISBURSING OFFICERS.

It is competent to the Secretary of the Treasury, under section 3620 Rev. Stat., as amended by the act of February 27, 1877, chap. 69, to permit disbursing officers to draw, and the assistant treasurers and public depositaries to pay, checks made payable to themselves or bearer or order, for such sums as may be necessary to make payments of small amounts, to make payments at a distance from a depositary, or to make payments of fixed salaries due at a certain period (as authorized by Treasury regulations of August 24, 1876), provided such checks bear indorsed thereon the names of the persons to whom the sums are to be paid, or the claim upon which they are to be paid, or are accompanied by a list or schedule, made a part of the check, containing the same information.

DEPARTMENT OF JUSTICE,

June 8, 1877.

SIR: In answer to your letter of the 5th instant, inquiring whether, under section 3620 of the Revised Statutes as amended by the act of February 27, 1877, which directs that after the word "law," in the fifth line thereof, the words "and draw for the same only in favor of the persons to whom payment is made" are to be inserted, any disbursing officer can draw his check in favor of himself or bearer in such amount as may be necessary to make payments of small sums, to make payments at a distance from a depositary, or to make payments of fixed salaries due at a certain period, as now authorized by the Department regulations of August 24, 1876, a copy of which you inclose, I have the honor to say:

The amendment to section 3620 is from the first section of the act of March 3, 1857, with this difference, that it does not contain the exception there found to the regulation that

Checks of Disbursing Officers.

checks must be drawn only in favor of the persons to whom payment is made, viz, of payments in sums under \$20, in which cases the disbursing agent was permitted to draw in his own name, stating that it was to pay small claims.

As this amendment, except with the omission referred to, is a re-enactment of the first section of the act of March 3, 1857, and as such provision was not in force at the time of the Department regulations of August 24, 1876, it is proper to consider what were the regulations adopted under said act. By referring to these (Treasury regulations of May 27, 1857), it will be found that agents were not only authorized to draw checks payable to themselves or bearer for such amounts as might be necessary to pay sums under \$20, which was expressly permitted by that statute, but also to draw such checks when it was their duty to pay salaries or compensation to persons employed in the public service, whose compensation was fixed and payable at certain periods, for sufficient amounts to pay such salaries or compensation, placing with the public depositary on whom such check was drawn a list or schedule officially signed by themselves, containing the names and sums payable to each person from the proceeds of such checks, and showing the amount thereof, and also to draw such checks when payments were to be made at a distance from a public depositary for such amounts as might be required to make such payments, provided that before the presentation of such check he should cause the depositary on whom it was drawn to be furnished with a list or schedule, officially signed, stating in detail the salaries, wages, and claims to be paid by the proceeds of such check, the names of the persons to whom payable, and the amount thereof.

The construction adopted by these regulations undoubtedly proceeds upon a ground similar to that which was suggested in the opinion I had the honor to render you on the 4th instant, namely, that the immediate object of the provision of law was that the books or vouchers of the assistant treasurer of the United States, public depositary, or other institution with whom a disbursing officer might be authorized by the Secretary of the Treasury to deposit public moneys, should show upon whose account and upon what claims or demands such

Checks of Disbursing Officers.

moneys were paid by the check of the disbursing officer, that these checks would thus, when compared with the vouchers of the disbursing officer, tend to show in what mode the public moneys had been disposed of by him, and would afford the means of testing the accuracy of his accounts, and that, if the evidence of the claim upon which the public money was paid was afforded by the check, all that was required by law had been complied with.

When, therefore, with the knowledge that such construction had been given to the first section of the act of March 3, 1857, Congress has re-enacted it, it must be considered that such construction has been deemed to be a reasonable one, and such as meets the intention of the legislative power, as manifested in the section referred to. Although the exception in regard to checks of a smaller amount than \$20 is not re-enacted, yet if the same precautions be used when such check is drawn to show immediately upon it, or by a list or schedule filed with it and thus made a part of it, the names of the individuals to whom the sum for which it is drawn is to be paid, the object of such a voucher is attained.

In direct answer to your inquiry, therefore, I am of opinion that it is competent for the Secretary of the Treasury to permit disbursing officers to draw, and the assistant treasurers and public depositaries to pay, checks made payable to themselves or bearer or order, for such amounts as may be necessary to make payments of small amounts, to make payments at a distance from a depository, or to make payments of fixed salaries due at a certain period, as now authorized by Department regulations of August 24, 1876, provided, always, that such checks bear indorsed upon them the names of the persons to whom the amounts drawn are to be paid, or the claim upon which they are to be paid, or are accompanied by a list or schedule, made a part of the check, containing the same information.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Acceptance of Civil Office by a Retired Officer.

ACCEPTANCE OF CIVIL OFFICE BY A RETIRED OFFICER.

A retired officer of the Army does not vacate his commission by accepting a civil office, unless it be an office in the diplomatic or consular service, in which latter case he is to be regarded as having resigned his place in the Army. From the general law applicable to such case, (contained in section 1223 Rev. Stat.,) a certain class of retired officers described in the act of March 3, 1875, chap. 178, are excepted.

He is not precluded from holding a civil office that does not belong to the diplomatic or consular service.

When he performs the duties of a civil office which he may lawfully hold, under and by virtue of an appointment to such office, he is entitled to draw his pay as a retired officer and also the salary provided for the civil office during the period of his incumbency of the latter office.

DEPARTMENT OF JUSTICE,
June 11, 1877.

SIR: In answer to your communication of the 4th instant, making certain inquiries as to retired officers and their relation to civil offices under the United States Government and the salaries thereof, I have the honor to say:

A retired officer does not, in my opinion, vacate his commission in the Army by accepting a civil office under the Government, unless that office is by appointment in the diplomatic or consular service of the Government; in which case he is to be considered as having resigned his place in the Army. Section 1222 of the Revised Statutes is to be applied to officers upon the active list of the Army, who thereby are forbidden to hold any civil office, whether by election or appointment, and are declared to cease to be officers of the Army, and to vacate their commissions, by acceptance of such offices. Section 1223 applies to all officers, whether upon the active or retired list of the Army, and must be deemed to enact that any officer upon either list, accepting an appointment in the diplomatic or consular service, is to be treated as having resigned his place in the Army. To this section there is an exception made by the act of March 3, 1875, which provides that a certain class of officers therein described, who are "borne upon the retired list, shall be continued thereon notwithstanding the provisions of section 2, chapter 38, act of March 30, 1868," which is embodied in section 1223

Acceptance of Civil Office by a Retired Officer.

of the Revised Statutes. Of course the officers therein described, even if accepting an appointment in the consular or diplomatic service, would not vacate their commissions.

Your second inquiry is whether a retired officer may hold a civil office under the United States Government.

The provisions of the statutes in regard to retired officers direct that they may be assigned to duty at the Soldiers' Home under certain circumstances, and that they shall not be assignable to any other duty. (Rev. Stat., sec. 1259.) And, further, that they may on their own application be detailed to serve as professors in any college. (Sec. 1260.) It would not, in my opinion, be a legitimate construction of these two sections to say that they prohibit an officer from accepting or being appointed to a purely civil office under the United States Government. In the absence of any provision of law forbidding such officers to hold civil offices, especially when these sections are taken in connection with the law that officers upon the active list are (by section 1222 of the Revised Statutes) held to have vacated their commissions by the acceptance of any civil office, and that all officers who accept or hold appointments in the diplomatic or consular service are (by section 1223) considered as having resigned their places in the Army, with the exception above alluded to, it must be considered that a retired officer is not precluded from holding a civil office under the United States Government, unless in the consular or diplomatic service.

The third question proposed by you is, whether a retired officer is entitled to draw his pay as such and also the salary of any civil office he may hold under the United States Government.

Sections 1763, 1764, and 1765 of the Revised Statutes forbid any person who holds an office, the salary or annual compensation of which amounts to the sum of \$2,500, to receive compensation for discharging the duties of any other office, unless expressly authorized by law; they also direct that no allowance or compensation shall be allowed to any officer or clerk by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department, and that no officer in any branch of the public service, or any other person whose salary, pay, or emoluments are

Acceptance of Civil Office by a Retired Officer.

fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

The construction which has been given to these statutes (especially in the case of *Converse vs. The United States*, 21 How., 463) is that the intent and effect of them is to forbid officers holding one office to receive compensation for the discharge of duties belonging to another, or additional pay, extra allowance, or compensation for such other services or duties where they hold the commission of but a single office, and, by virtue of that office, or in addition to the duties of that office, have assigned to them the duties of another office. According to that decision, however, if an officer holds two distinct commissions, and thus two distinct offices, he may receive the salary for each. The evil intended to be guarded against by these statutes was not so much plurality of offices as it was additional pay or compensation to an officer holding but one office for performing additional duties, or the duties properly belonging to another. If he actually holds two commissions, and does the duties of two distinct offices, he may receive the salary which has been appropriated to each office. Sections 1763, 1764, and 1765, above referred to, are condensations from statutes which were in existence at the time that this decision was made, and in conformity with it I deem it my duty, in answer to your inquiry, to say that a retired officer may draw his pay as such, and may also draw the salary of any civil office which he may hold under the Government, assuming always that the duties of the civil office are performed under and by virtue of a commission appointing him to that office, which he holds in addition to his rank as a retired officer.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

Mileage of Naval Officers.

MILEAGE OF NAVAL OFFICERS.

Under the act of June 30, 1876, chap. 159, mileage is allowable to officers of the Navy only when traveling on public business within the United States. For travel without the United States their actual expenses alone can be allowed.

Held, accordingly, that where a naval officer was ordered home from Hong-Kong, and furnished with a through ticket, (such ticket being assumed to have covered his actual expenses,) he is not entitled to the difference between the cost of that ticket and the mileage established by that act.

DEPARTMENT OF JUSTICE,

June 13, 1877.

SIR: Referring to your communication of the 7th instant, I have the honor to say that, as an answer to the second inquiry contained therein involves an answer to the first, I will proceed to consider and answer the former.

It is, in substance, as follows: Whether the mileage established by the act of June 30, 1876, (Session Laws of 1875-'76, p. 65,) is to be allowed and paid to naval officers alike when traveling under orders within or without the United States in lieu of actual expenses, or is to be restricted to cases of traveling within the United States.

In order to answer this inquiry it will be necessary to consider the legislation previous to the act in question. By the act of March 3, 1835, it was declared that the yearly allowance provided in that act for naval officers should be "all the pay, compensation, and allowance that shall be received under any circumstances whatever by any such officer or person, except for traveling expenses when under orders, for which ten cents per mile shall be allowed." By the construction given to this act by the Navy Department, the mileage therein provided for was considered to be payable only when the officer traveled within the United States. The reasons for this construction may perhaps be found in the legislation, and the course of official action under it, which preceded the said act. Under the appropriation for the traveling expenses of officers, the Department had previously thereto, by regulation, confined officers traveling abroad under orders to their actual expenses, but had allowed officers traveling within the United States mileage. This mileage

Mileage of Naval Officers.

varied in rate partly according to the character of the conveyance used and partly according to the rank of the officer. When, therefore, Congress passed the law of March 3, 1835, in regard to mileage, and continued still to appropriate as before for the traveling expenses of officers, it was deemed that it was the intent thereof only to regulate the mileage in the cases in which it had previously been paid, and not to legislate in regard to those cases in which only actual traveling expenses had before been allowed.

On October 19, 1842, an opinion was rendered by Attorney-General Legaré to the effect that such construction had been so long adopted by the Department that even if in the first instance it were doubtful, it was then one which should continue to be acted upon. He held that it was impossible that by this act it was intended by the legislature that the law in regard to mileage could be construed to allow the same to those officers traveling by sea—perhaps for the reason (although this is not stated in the opinion) that if a literal construction were given to the law, inasmuch as every officer who is performing a cruise is traveling by sea, he would be entitled to mileage while engaged in the actual performance of his duties.

The construction adopted by the Department, and thus sanctioned by Mr. Legaré, continued in force until the act of June 16, 1874, and consequently received much added weight from the great length of time which had elapsed from the date of the act and the time when the opinion was given. In addition to this, the Regulations of the Navy had expressly recognized that such was the construction to be given to the act; and, by the regulations of 1870 (paragraph 1491), while the allowance for the traveling expenses of officers was fixed by law at 10 cents per mile when the traveling was within the limits of the United States, for traveling out of the United States the actual necessary expenses only were allowed. This construction must be deemed, therefore, to have been sanctioned by the legislature, it having been for so many years the official construction of the Department itself, as shown by its regulations, with the approval of the Attorney-General.

This provision of the act of March 3, 1835, and other pro-

Mileage of Naval Officers.

visions, are incorporated in the Revised Statutes, section 1566. This section never actually went into effect so far as this subject is concerned, as by the act of June 16, 1874, it was provided that "only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileage and transportation in excess of the amount actually paid are hereby declared illegal." This act took effect in such a way as to operate to repeal the section referred to so far as this subject was concerned before the same actually had effect. (Rev. Stat., Sec. 5601). On June 30, 1876, Congress again legislated upon the subject, which is the act referred to in your communication, and then enacted that so much of the act of June 16, 1874, as provided that only traveling expenses shall be allowed to any person holding employment or appointment under the United States, while engaged on public business, as was applicable to the officers of the Navy so engaged, should be repealed. It adds: "And the sum of 8 cents per mile shall be allowed such officers while so engaged, in lieu of actual expenses."

The latter act, like that of March 3, 1835, is not confined in terms to those officers who are engaged in traveling within the limits of the United States, but adopts substantially the phraseology of the earlier act, to which the construction heretofore adverted to had been given. It adds the words "in lieu of actual expenses," which are not found in the previous act; but as those words must be understood in that act under any construction which is given to it, I do not deem that their addition is a matter of any importance.

It was known, when the act of June 30, 1876, was passed, that the construction which for years had been given by the Navy Department to the law providing that mileage should be paid to officers of the Navy limited the allowance of the same to those traveling within the limits of the United States. When, therefore, Congress re-enacted the law substantially in the same terms and made no clear provision that the mileage should be paid to those officers who travel by sea and out of the limits of the United States, it must be deemed that in thus re-enacting it has accepted the construction theretofore put upon a similar act by the Navy Department.

Issue of Subsidiary Silver Coin.

I am therefore of opinion that under the act in question mileage is to be allowed and paid to naval officers only when traveling within the United States, in lieu of their actual expenses, and that when traveling without the United States they are to receive their actual expenses alone.

This involves an answer to your first inquiry, which answer is, that an officer of the Navy ordered home from Hong-Kong, and furnished a through ticket, (assuming of course that such ticket covered his actual expenses,) cannot lawfully be allowed and paid the difference between the cost of that ticket and the mileage established by the act of June 30, 1876.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

ISSUE OF SUBSIDIARY SILVER COIN.

Under the third section of the joint resolution of July 22, 1876, the amount of "fractional currency outstanding" is to be determined not merely by the records of the Treasury Department which show how much has been issued and redeemed, but also by ascertaining how much has been lost or destroyed so that it can never be presented for redemption.

When satisfied as to the amount lost or destroyed, the Secretary of the Treasury has authority to issue an equal amount of subsidiary silver coin to replace it, subject to this restriction, viz, that the aggregate amount of subsidiary silver coin put in circulation, together with the amount of fractional currency outstanding, is not at any time to exceed \$50,000,000.

DEPARTMENT OF JUSTICE,
June 14, 1877.

SIR: By your letter of the 11th instant I am informed that the amount of subsidiary silver coin, when added to the fractional currency which has been issued and not redeemed, reached practically to \$50,000,000; and you inquire, in substance, whether under the third section of the joint resolution of July 22, 1876, you are authorized to continue the issue of silver coin in place of the fractional currency heretofore issued which is shown to have been lost or destroyed.

I have the honor to reply:

Issue of Subsidiary Silver Coin.

By the act of January 14, 1875, the Secretary of the Treasury was authorized to issue subsidiary coin in redemption of fractional currency until the amount of such fractional currency outstanding should be redeemed.

By the act of April 17, 1876, he was authorized to issue such silver coin in redemption of an equal amount of fractional currency, whether the same was then in the Treasury awaiting redemption or whenever it might thereafter be presented for redemption.

The third section of the joint resolution of July 22, 1876, is as follows:

"SEC. 3. That, in addition to the amount of subsidiary silver coin authorized by law to be issued in redemption of the fractional currency, it shall be lawful to manufacture at the several mints, and issue through the Treasury and its several offices, such coin, to an amount that, including the amount of subsidiary silver coin and of fractional currency outstanding, shall in the aggregate not exceed at any time fifty million dollars."

It was, in my opinion, intended by this section that the money to be used as "change" should amount to \$50,000,000; and when the term "outstanding" was used in reference to the coin and fractional currency theretofore issued, it was contemplated that the Secretary should ascertain how much of that which had before been issued was still outstanding. It was a publicly known fact that all paper currency was to a considerable extent destroyed by use, this fact having been shown repeatedly in the cases of those banks which have been at various times compelled to redeem the bills issued by them. In regard to an issue of fractional currency, it was also quite clear that from the number of pieces in use such losses would be proportionally greater than in issues of bills of larger amounts.

While it is perhaps not a safe mode of construing an act to refer to the debates of the legislature which preceded, it is important in this connection to observe that this fact in regard to the destruction of paper money by use was well known and understood, and was a subject of discussion in Congress in connection with a bill for which the resolution in question was afterwards substituted. It was proposed in the

Issue of Subsidiary Silver Coins.

House of Representatives that, in addition to the amount of subsidiary coin authorized by law to be issued in redemption of fractional currency, it should be lawful to manufacture at the several mints, and issue through the Treasury and its several offices, a further amount of twenty millions; and this bill was passed by the House. In the discussion upon it, it was contended upon the one side that this would not more than replace the amount of fractional currency which had been worn out or destroyed, and which would never be presented for redemption. Upon the other side, while it was admitted that a considerable portion of such fractional currency had thus been destroyed, it was contended that the amount was much less than twenty millions. The importance of this in reference to the question under consideration is only that the fact that a large amount of paper currency is necessarily destroyed by use was one which was fully considered by Congress in its debates. (See Ceng. Rec., pp. 3748, 3749, and 3750.) The bill passed by the House was not accepted by the Senate, and in place of it the resolution under consideration was passed.

When, therefore, the fact was clearly known and understood that a considerable amount of fractional currency had been destroyed, and Congress uses the phrase "outstanding" instead of the phrase "which has been issued and not redeemed," or some similar phrase which would indicate an intent upon its part that the amount of the fifty millions should be determined by the amount issued and not by that actually in existence, it must be held that by the term "outstanding" was intended that currency which still continued to form a portion of the circulating medium, and for which the Treasury might thereafter become liable.

I am therefore of opinion that the amount of fractional currency outstanding is to be determined not merely by the records of the Department which show how much has been issued, but also by ascertaining how much of that issue has now been lost or destroyed so that it can never be presented for redemption.

This, of course, presents a question of fact for your consideration. If it should be shown that as large an amount as a million dollars in fractional currency had been destroyed by

Review of Departmental Decision.

are, upon being satisfied of that fact it would be competent for the Secretary of the Treasury to issue a corresponding amount of subsidiary silver coin. To determine how much of the fractional currency heretofore issued has been lost or destroyed by use is a difficult question, but, as suggested, one of fact only. Upon being satisfied as to the amount of fractional currency which has been thus lost or destroyed, the Secretary is authorized to issue an equal amount of subsidiary silver coin to replace it, provided that the whole amount of subsidiary silver coin and of fractional currency in existence is not to exceed the fifty millions which it was contemplated by Congress should be in circulation for the purposes of "change."

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

REVIEW OF DEPARTMENTAL DECISION.

Where an application was made to the Secretary of the Interior to review a decision of his predecessor, but it did not appear that any new facts in the case were presented, nor that any change in the law had taken place since the decision was made: *Held* that the principle of *res adjudicata* applies, and *advised* that the former decision be adhered to.

DEPARTMENT OF JUSTICE,

June 15, 1877.

SIR: In answer to your communication of the 5th instant, inquiring as to the authority of the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, to issue an order temporarily prohibiting the reception of all applications for homestead entries under section 2306 of the Revised Statutes, and whether such authority can be held to defeat valid claims or applications during the pendency of such order, I have the honor respectfully to say:

There is, in my opinion, a preliminary question which should be decided before disposing of the questions in your communication, and, if you should concur with me in the view I take of it, the discussion of these questions will be unnecessary.

The whole matter to which your communication refers had been decided by your predecessor, the Hon. Z. Chandler, on

Pay of Retired Naval Officers.

June 1, 1876. No petition for any review of that decision had been made to him. It does not appear that there are any new facts in the case, nor that any change has been made in the law. Under these circumstances, an application is now made to you to review a decision which is final to as great an extent as any decision of a Department can be. It is a well-settled rule of administrative action that matters once fully discussed and finally decided by a Department are not to be reopened, but the parties left to such other remedies, if any, as they may have, unless application for review be made upon new facts, a new state of the law, or some extraordinary circumstances, such as do not appear in the present case. Such has been the opinion expressed on many occasions by my predecessors, and in a communication made to you by myself of the date of March 20, 1877, in regard to the "Las Animas grant," I had the honor to call your attention to this rule and the authorities which indicated that it had received substantially continuous approval. It is desirable upon all accounts that there should be an end of controversies, and that claims once fully heard and distinctly decided should not be reopened where the circumstances have in no manner changed. Unless such is the case, as each successive incumbent of one of the great administrative offices assumes his position he may be compelled to review all the decisions of his predecessors which have been against applicants and claimants.

I therefore respectfully recommend that the decision made by your predecessor be adhered to.

Should you, on reflection, determine to review such decision, it will give me pleasure to express my opinion upon the questions stated in your communication.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

PAY OF RETIRED NAVAL OFFICERS.

In September, 1871, R., a paymaster in the Navy, was retired on furlough pay under section 23 of the act of August 3, 1861, chap. 42, and was thereupon allowed, under section 5 of the act of July 15, 1870, chap. 295, one-half of the highest pay of his grade. In May, 1876, he was transferred

Pay of Retired Naval Officers.

(under section 1594 Rev. Stat.) from the furlough to the retired pay list. By section 1593 Rev. Stat. officers retired on furlough pay are entitled to only one-half of leave-of-absence pay, and by section 1588 Rev. Stat. general provision is made fixing the pay of retired officers who do not fall under special provisions in that and other sections. *Held* that, after the Revised Statutes took effect, R. was entitled to receive only the pay provided by section 1593, and remained so entitled until the date of his transfer, when he became entitled to receive the pay provided by section 1588.

Sections 1588, 1590, and 1593 Rev. Stat., which contain provisions both of a general and special character prescribing the compensation of retired naval officers, and embrace within their scope all such officers, whether of the line or staff, superseded all provisions in force at the adoption of the Revised Statutes by which that compensation was previously regulated, and those sections thereafter furnished the only law upon the subject.

In the absence of constitutional restriction, the future compensation of a public officer may be altered at pleasure by the legislature during his incumbency, without violating any legal right vested in him by virtue of his appointment.

Accordingly, the retirement of R., and allowance to him of compensation under the act of July 15, 1870, prior to the adoption of the Revised Statutes, did not give rise to a right in his favor, "accruing or accrued," which is protected by the saving provision of section 5597 Rev. Stat.

DEPARTMENT OF JUSTICE,

June 18, 1877.

SIR: By a letter of your predecessor in office dated the 8th of February last, which was not received at this Department until the 6th of March following, the questions hereinafter stated were, at the suggestion of the Second Comptroller, submitted to the Attorney-General for an opinion thereon. Finding this call for an opinion unanswered by the Attorney-General during whose incumbency it was received, I have considered the questions myself, and now have the honor to communicate to you the conclusions reached.

It appears that on the 8th of September, 1871, R. B. Rodney, a paymaster in the Navy, was retired on furlough pay under section 23 of the act of August 3, 1861. He was thereupon allowed, however, under section 5 of the act of July 15, 1870, not furlough pay, but one-half of the highest pay of his grade. On the 19th of May, 1876, he was transferred by the President from the furlough to the retired pay list, (under, it is presumed, section 1594 of the Revised Statutes.) The

Pay of Retired Naval Officers.

questions to which reference is above made, and which are presented in connection with these facts, are—

1. "After the enactment of the Revised Statutes, is Rodney to be paid under the provisions of the act of 1870 or under section 1588 of the revision; that is, if the act of 1870 is repealed by the revision, is the prior retirement of the officer and the fixing of his pay under the act of 1870 such an act done or right accrued as to be saved by the repeal provisions of the Revised Statutes?

2. "If the Revised Statutes apply to the case of Rodney, who was retired on furlough before the passage of the Revised Statutes, would he be entitled only to furlough pay, as established by section 1593 of the revision, from the date when the revision took effect to the date when he was transferred by the President as above stated?"

The act of August 3, 1861, section 23, under which Rodney was retired on furlough, gave to officers of the Navy so retired a compensation equivalent to one-half of leave-of-absence pay. Section 22 of the same act fixed the compensation of the other retired naval officers.

By the twentieth section of the act of July 16, 1862, a new provision was made respecting the pay of the *line* officers of the Navy on the retired list, which was construed to supersede the provision of the act of August 3, 1861, relative to the pay of these officers, and, in effect, to do away with furlough pay so far as they were concerned; and by the seventh section of the act of April 21, 1864, it was provided that the retired pay of the staff officers in the Navy should be the same as that of the retired officers of the line with whom they have relative rank. Thereupon the staff as well as the line officers on the retired list of the Navy, whether they had been retired on furlough or otherwise, were allowed compensation under the act of July 16, 1862.

But by the fifth section of the act of July 15, 1870, another change was made in the law relating to the compensation of these officers. That section provided that from and after the 30th of June, 1870, "the pay of all officers of the Navy now on or hereafter placed on the retired list shall, when not on active duty, be equal to one-half of the highest pay prescribed by this act for officers on the active list whose

Pay of Retired Naval Officers.

grade corresponds to the grade held by such retired officers respectively at the time of such retirement," &c. And the law was still further modified by the first section of the act of March 3, 1873, which provided "that those officers on the retired list, and those hereafter retired, who were or who may be retired after forty years' service, or on attaining the age of sixty-two years, * * * or those who were or may be retired from incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, from sickness or exposure therein, shall, after the passage of this act, be entitled to 75 per centum of the present sea-pay of the grade or rank which they held at the time of their retirement."

Thus stood the law on the subject of the compensation of retired naval officers at the time of the adoption of the Revised Statutes.

Section 1588 of the Revised Statutes provides: "The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been or may be retired after forty years' service upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to 75 per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea-pay provided by this chapter for the grade or rank held by them respectively at the time of their retirement." Section 1590 provides: "Officers who have been retired as third assistant engineers shall continue to receive pay at the rate of four hundred dollars a year." And section 1593 provides: "Officers placed on the retired list, on furlough pay, shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list."

These sections contain provisions both of a general and special character, prescribing the compensation of retired naval officers, which together embrace within their scope all

Pay of Retired Naval Officers.

such officers, whether of the line or staff. They must, accordingly, be deemed to have repealed, upon the adoption of the Revised Statutes, all the provisions then in force by which that compensation was previously regulated, and to have constituted thereafter the only law upon the subject.

Hence, in determining what is the *retired pay* of naval officers on the retired list since the date of the revision, we are governed entirely by the provisions of the sections cited. If the officer comes within the terms of section 1593, the pay to which he is entitled is the pay prescribed by that section. If he comes within the terms of section 1590, he is entitled to the pay thereby fixed. If he belongs to any of the classes of retired officers described in the *first sentence* of section 1588, he is entitled to the pay allowed thereby. But if he is not within section 1593, nor within section 1590, nor within the first sentence of section 1588, he is, in that case, to be regarded as within the second or *last sentence* of the latter section, (which is general, and intended to include all retired officers not falling under either of the other provisions adverted to,) and entitled to the pay thereby established.

It will be observed that section 1593 re-enacts substantially the provision in the act of August 3, 1861, relative to the compensation of officers retired on furlough pay. That provision had in practice been considered as superseded by the acts of July 16, 1862, and April 21, 1864. After the date of these acts, officers retired on furlough pay under the act of August 3, 1861, were therefore no longer limited to furlough pay, (*i. e.*, one-half of leave-of-absence pay,) but were allowed the pay of retired officers as fixed by the act of 1862 and later by the act of July 15, 1870. Thus, Paymaster Rodney, though retired on furlough pay under the act of 1861, was allowed compensation under the act of July 15, 1870, (which was in force at the time of his retirement,) that is to say, one-half of the *highest pay* prescribed by the latter act for an officer on the active list of a corresponding grade.

In connection with the fact just stated, the first of the above questions suggests this inquiry: whether the retirement of Mr. Rodney, and the fixing his pay under the act of 1870, constitute such an act done or right accrued as to be within the saving provision of section 5597 of the Revised

Pay of Retired Naval Officers.

Statutes, which declares: "The repeal of the several acts embraced in said revision shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner as if said repeal had not been made," &c.

An appointment to a public office is not a contract. Hence, in the absence of constitutional restriction, the compensation of a public officer may be altered at pleasure by the legislature during his incumbency without violating any legal right vested in him by virtue of his appointment. The right which his appointment confers is nothing more than a right to receive, during the period of his continuance in office, such compensation as may from time to time be provided by law; it does not confer a right to *have allowed to him*, during that period, the particular compensation which was authorized when he was appointed. Accordingly, should the legislature deem it expedient to diminish the future compensation of the officer, this, so far from affecting or impairing the right of the latter derived under his appointment, would be entirely consistent therewith. When, therefore, by the enactment of section 1593, Congress prescribed a rate of compensation for officers "placed on the retired list, on furlough pay," less in amount than that which they were previously allowed, such legislation cannot be considered to affect or operate upon any right of theirs, "accruing or accrued." The reduction of the pay of those officers, thus made, involved no change in, but was in harmony with, the right to compensation held by them. It follows that the previous retirement of Mr. Rodney, and allowance to him of compensation under the act of 1870, did not give rise to such a right as comes within the saving provision of section 5597.

Respecting the questions submitted, then, my views are as follows: The correct answer to the first is, that upon the adoption of the Revised Statutes the compensation of Mr. Rodney ceased to be payable under the provisions of the act of 1870, and became payable under the provisions of the Revised Statutes. The correct answer to the second is, that after the Revised Statutes took effect he was only entitled to

Disposal of Old Material.

receive the pay provided by section 1583, and remained entitled to receive only that pay until the date of his transfer by the President to the "retired-pay list," when he became entitled to receive the compensation provided by section 1588.

I have the honor to be, very respectfully,

CHAS. DEVENS.

Hon. R. W. THOMPSON,

Secretary of the Navy.

DISPOSAL OF OLD MATERIAL.

Upon examination of section 3618 Rev. Stat., amended by act of February 27, 1877, chap. 69, and also of section 3672 Rev. Stat.: *Advised* that the Chief of the Bureau of Engraving and Printing cannot be authorized by the Secretary of the Treasury to exchange certain old presses for a new press with the manufacturers, so that but a small amount of money in addition will have to be paid to them therefor; yet that the Secretary may authorize a sale of the old presses to the manufacturers, the proceeds to be covered into the Treasury, and at the same time a purchase of the new press can be made from them, paying for the same out of the appropriation available for that purpose.

DEPARTMENT OF JUSTICE,
June 23, 1877.

SIR: I am informed by your letter of the 21st instant that it is in the power of the Chief of the Bureau of Engraving and Printing to exchange certain old presses for a new press, so that but a small amount of cash in addition will have to be paid to the manufacturers of the new press, and you inquire whether, as the old presses are no longer needed and are much worn, and as in this way they will probably produce more than in any other, you are justified in authorizing him to make the purchase in the manner thus indicated.

It may often happen that by the judicious use of old material in exchange for necessary machinery more advantageous contracts may be made than in any other mode; yet I am not prepared to say that such contracts are authorized by law. It has been the intention of Congress, as manifested by the statutes, (except in certain cases specifically named,) to require that the proceeds of old material which is sold should be covered into the Treasury and thus accounted for. Although such exchanges may often be conducted to advan-

Disposition of Old Material.

tage, yet Congress has deemed it better, as a rule of business, to prescribe that the officer having charge of old material should dispose of and account for it as such, and afterwards make the purchase of such new material as he required out of the specific appropriation for that purpose.

Section 3618 of the Revised Statutes is as follows:

"All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of revenue cutters, or of the sales of commissary stores to the officers and enlisted men of the Army, or of the sale of condemned Navy clothing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of 'proceeds of Government property,' and shall not be withdrawn or applied, except in consequence of subsequent appropriation made by law."

This section has been amended, by inserting after the word "Army," in the fifth line thereof, the words "or of materials, stores, or supplies sold to officers and soldiers of the Army."
(Act of February 27, 1877, chap. 69.)

The sales which are included within the exceptions in this section are controlled by other sections, which regulate the mode in which the sales of such property shall be made and the proceeds thereof applied.

Section 3672 provides that "a detailed statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind shall be included in the appendix to the Book of Estimates."

These sections contemplate that there will be sales of old material necessarily made in the various Departments of the Government other than those included within the exceptions. For the mode in which such sales shall be conducted—whether by advertisement, at public auction, or otherwise—no specific provision is made. In these respects the sales are left to the discretion of the officer having charge of such old material. But it is required that when such sales are made the proceeds shall be covered into the Treasury on account of "proceeds of Government property," and that a detailed statement of them shall be thereafter made.

Advertising Tax-Lists in the District.

It is therefore in your power to make two transactions, which will produce, so far as the benefit to the Government is concerned, the same result that would be produced by an exchange. By one of them you can sell to the manufacturers of the printing press the old presses at a rate which you shall determine to be fair and just, but the sum received from such sale will necessarily be covered into the Treasury on account of "proceeds of Government property." By the other transaction you may purchase from the manufacturers, paying for the same out of the appropriation which is put into your hands for that purpose, the new press which is desired for use. While the result, so far as the Government is concerned, is the same, it will not, of course, have the same effect upon your appropriation as would be produced if you were entitled to pay for the new press with the proceeds of the old presses; but you will be compelled to pay in full for such new press from the appropriation in your hands for such an expenditure, while the amount received from the old presses, being covered into the Treasury, will then be subject to the future action of Congress.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

ADVERTISING TAX-LISTS IN THE DISTRICT.

Section 5 of the act of July 12, 1876, chap. 680, providing for the publication of lists of property in arrears for taxes, does not authorize the Commissioners of the District of Columbia, in determining the "lowest bidder" for making such publication, to have regard to the circulation of each newspaper bidding. It is sufficient if the paper is a *bona fide* newspaper and there is nothing as to the amount of publicity which the notice may receive that will defeat the purpose of the legislature in requiring the advertisement.

DEPARTMENT OF JUSTICE,

June 27, 1877.

GENTLEMEN: Yours of the 25th instant, addressed to the President, has been referred for consideration to the undersigned, and herewith I submit a reply:

Advertising Tax-Lists in the District.

The question propounded is whether the tax-law for this District, approved July 12, 1876, in providing (section 5) for the *publication*, preliminary to sale, &c., of certain lists of property upon which taxes are in arrears in some newspaper published in said District, "*being the lowest bidder for the work,*" allows that in determining *the lowest bidder* regard may be had to the respective *circulation* of each newspaper bidding.

In this connection you state that the respective circulation of the newspapers in this District varies "from two or three thousand to fifteen or sixteen thousand."

It is evident that, rates being the same, one who advertises in a newspaper with a larger circulation gets more for his money than he who advertises in one with less.

It is also evident that a newspaper offering to publish a notice at a certain price will make a smaller rate of profit than another newspaper which, with much less circulation, offers the same terms; at all events, where the advertisements are exceptionally long.

So, if the newspaper with the smaller circulation proposes rates somewhat less than the other, the difference of circulation may be such as still to leave it true that the advertiser has gotten a better bargain by accepting the terms of the other newspaper, whilst the latter has actually done the work at a less rate of *profit* than would have been earned by its competitor.

In the same way it is true that a newspaper having a certain class of patrons offers advantages to advertisers desiring to call the attention of that class which other newspapers do not give, for which, therefore, merely as matter of *economy*, such advertisers may feel themselves bound to pay, although nominally higher than are offered elsewhere.

In ordinary cases, however, such considerations are of the nature of refinements; and where an act requires a public officer to advertise in a newspaper "*being the lowest bidder,*" he is certainly *safe* in construing the expression literally wherever the parties making offers are *bona fide* newspapers, and there is nothing as to the amount of publicity which the notice may thus receive that will defeat the purpose of the legislature in requiring the advertisement.

Advertising Tax-Lists in Sunday Paper.

More than a certain amount of publicity may be superfluous. In the present case a public statute has already placed property-owners in the District upon the *qui vive* as to the result of neglect to pay taxes in 1876-'77. Besides, Congress has chosen to designate the successful newspaper as that which shall be the *lowest bidder*.

Upon the whole, I cannot advise that regard can be had to their respective "circulation" as between *bona fide* newspapers, advertisement in any one of which will not plainly defeat the end that Congress had in view in ordering publication. Whilst it is thus admitted that the Commissioners have some discretion in determining who are authorized to be considered *bidders*, yet, that point being settled, I think it is safest to construe the phrase "lowest bidder" literally.

In cases like the present, legislatures frequently order the advertisement to be made in newspapers "having the largest circulation" within a certain locality. Congress, in the present instance, has declined to follow their precedents. I submit, therefore, that "circulation" can be considered only as bearing upon the question whether in the particular instance it is too small to afford whatever publicity is obviously required by the policy of the statute; in other words, a reasonable publicity.

I am, gentlemen, very respectfully and truly, yours,
S. F. PHILLIPS,
Acting Attorney-General.

Hon. W. DENNISON,
J. H. KETCHAM,
SAMUEL L. PHELPS,
Commissioners of the District of Columbia.

ADVERTISING TAX-LISTS IN SUNDAY PAPER.

The advertisement of the list of property in arrears for taxes, under section 5 of the act of July 12, 1876, chap. 180, would not be in conformity to the laws in force in the District of Columbia if made in a newspaper published on Sunday.

The provisions of that act must be construed in connection with the other statute law of the District, and they are not to be taken to repeal any part of the latter unless where necessarily repugnant thereto.

DEPARTMENT OF JUSTICE,

June 30, 1877.

GENTLEMEN: In your note of to-day you ask, "Will the advertisement of the tax-list under the fifth section of the act entitled 'An act for the support of the government of the District of Columbia for the fiscal year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes,' approved July 12, 1876, in a newspaper published in said District *on Sunday*, said paper being 'the lowest bidder,' be legal in all respects?"

This question turns upon the state of the statute law within this District upon the matter of the observation of Sunday. Unless there be a statute prohibiting such advertisements, it will be valid, as there is nothing in the common law to forbid it.

There are two statutes in force here which may be quoted upon this matter: (1) The Maryland act of 1723, chap. 16, sec. 10, which provides that "no person shall work or do any bodily labor on the Lord's day, commonly called Sunday;" and (2) the English act of 29 Charles II, chap. 7, sec. 6, "That no person upon the Lord's day shall serve or execute, or cause to be served or executed, any writ, process," &c.

The method by which the District compels its debtors to pay their tax debts is certainly *process*, and the method which the law prescribes for notifying such debtors of the proceedings *in invitum*, by which that payment will be enforced, is *service* of such process. Although the *process* is not that of the ordinary tribunals of justice, but is summary, and the *service* is by advertisement, their fundamental character is none the less that of service and process, and no reason occurs to me why, if a summons before an ordinary magistrate, whose effect is that the party served may thereby avoid the application of force by the sovereign to his person or property, be prohibited *upon Sunday*, such summons before an extraordinary tribunal is not equally within the policy and words of the law.

In the present state of the law within this District, I am of opinion that no civil process can be served upon Sun-

Mail Service.

day, whether personally by an officer or virtually through an advertisement published exclusively on that day.

The Maryland act of 1723, above cited, is no doubt, as to many of its provisions, antiquated and obsolete. I am not satisfied, however, that the prohibition quoted above, which is a proposition complete in itself, is not yet in force, whatever may be said as to the penalty which, *in addition to the simple prohibition*, is inflicted upon those who violate the provision. I am inclined to believe that work and bodily labor upon Sunday is still prohibited within the District, except so far as within and for Washington City (*only*.) Some municipal ordinances may have modified the above statute. The question here, however, is of a work and bodily labor which shall be good *anywhere in the District*, and not in this city alone. If not good everywhere in the District, it can make no matter that it may be allowable in certain portions thereof.

The *publication* of a newspaper upon Sunday (it makes no matter when its printing and other preparation have been done) is certainly "bodily labor," and therefore I strongly incline to think that the circulation of the notice in question cannot be lawful upon Sunday, at least outside of Washington City.

Returning to your question, and giving it the categorical answer which you desire, I have to say that the advertisement of the sort of notice which you propose in a newspaper published on Sunday will not be legal in all respects. The general words of the act of July, 1876, are to be construed in connection with the other statute law of the District, unless where necessarily repugnant thereto.

With great respect, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

Hon. W. DENNISON,

J. H. KETCHAM,

S. L. PHELPS,

Commissioners of the District of Columbia.

MAIL SERVICE.

The appropriation made by the act of March 3, 1877, chap. 105, to pay the amount due to mail contractors "for mail service performed" in

Mail Service.

certain Southern States before the war of the rebellion, is not applicable to the payment of a claim for one month's additional pay to which a contractor became entitled by his contract where the same was arbitrarily terminated by the government, such claim being in the nature of a claim for liquidated damages.

DEPARTMENT OF JUSTICE,

July 5, 1877.

SIR: Referring to your letter of the 2d instant, I have the honor to say that I understand the inquiry proposed thereby to be whether, by the act of Congress approved March 3, 1877, by which the sum of \$375,000 was appropriated to pay the amounts due to *ante-bellum* mail contractors in the Southern States, it is competent for, or the duty of, the Department to allow to a contractor the one month's additional pay to which he was entitled by his contract when the same was arbitrarily terminated by the Government.

I do not understand the inquiry to be whether or not such contractor might maintain a claim for damages by reason of the termination of his contract in the Court of Claims, as in reference to that different questions would properly have to be examined.

Under the act of March 3, 1877, the amount which is appropriated to pay the mail contractors is for mail service performed in certain States, including the State of Texas, before said States respectively engaged in war against the United States. The claim of Mr. Giddings is not for mail service performed, but it is a claim in the nature of a claim for liquidated damages by reason of the alleged arbitrary termination of his contract. For such a claim no provision is made in this act. It limits itself strictly to the payment of the amounts due to mail contractors for mail service performed. This statement seems to be a conclusive argument that under the act in question Mr. Giddings can maintain no such claim as that for the additional month's pay to which he would under certain circumstances have been entitled had his contract been arbitrarily terminated by the Government.

Very respectfully, your obedient servant,

CHAS. DEVENS,

Attorney-General.

Hon. DAVID M. KEY.

Promotion in the Quartermaster's Department.

PROMOTION IN THE QUARtermaster's DEPARTMENT.

H., an assistant quartermaster, (whose commission is junior to the commissions of twenty-two other assistant quartermasters,) having served as an assistant quartermaster of volunteers from June 9, 1862, to March 22, 1867, and from the latter date as an assistant quartermaster in the Regular Army under his present commission, claimed to be entitled to promotion to the grade of major in the Quartermaster's Department on account of fourteen years' continuous service. An obstacle to immediate promotion being presented by section 4 of the act of March 3, 1875, chap. 126, the question is whether H. is entitled to be promoted upon the next happening of a vacancy in said grade, the provisions of that section not being in the way: *Held* (1) that he is not so entitled on the ground of continuous service; (2) that under existing law the right to promotion, in case of such vacancy, would be governed by seniority of commission, irrespective of the past service of the officer.

DEPARTMENT OF JUSTICE,
July 6, 1877.

SIR: By your letter of the 21st ultimo, inclosing a communication from Capt. Charles H. Hoyt, assistant quartermaster, and other papers, you inform me that that officer, "having served continuously since June 9, 1862, under commissions as captain, first as assistant quartermaster of volunteers from June 9, 1862, to March 22, 1867, and from the latter date to the present time as assistant quartermaster United States Army, claims that, under the provisions of the third section of the act of August 3, 1861, chap. 42, (12 Stat., 287,) and of the 123d article of war, (Rev. Stat., sec. 1342,) he is entitled, after fourteen years' continuous service with the rank of captain in the Quartermaster's Department, to be promoted to the grade of major, as provided in the first of the above-designated enactments." You remark, further, that the prohibition of section 4 of the act of March 3, 1875, (18 Stat., 338,) stands directly in the way of his immediate promotion, and request my opinion upon the following question, viz:

"Whether, under existing law, Captain Hoyt has such precedence in rank as to entitle him, upon the next happening of a vacancy in the grade of major, to promotion in preference to any other captain of less than his length of con-

Promotion in the Quartermaster's Department.

tinuous service as a captain and assistant quartermaster, either in the regular or volunteer force."

The third section of the act of August 3, 1861, to which you refer, declares that "Whenever any Army captain of the Quartermaster's Department shall have served fourteen years' continuous service he shall be promoted to the rank of major." This provision was intended to apply solely to the permanent military establishment known as the Regular Army, of which the Quartermaster's Department then contained, as it now contains, officers in each of the grades of captain, major, lieutenant-colonel, and colonel, with one chief officer holding the rank of brigadier-general. At the time of the passage of that act, all vacancies in that department occurring in the grade of major (so, likewise, all vacancies in the grades of lieutenant-colonel and colonel) were required to be filled by promotion from the next lowest grade in the same department, according to seniority of commission, except in case of disability or other incompetency. (Sec. 1, act of March 3, 1851, 9 Stats., 618; Army Reg., par. 19.)

The effect of the above provision was to enable the senior captain, and those of the same grade standing next to him in line of promotion, upon the completion of fourteen years' continuous service in the Quartermaster's Department, to be advanced to the rank of major, although no vacancies in the latter grade might at the time exist.

Subsequently, however, by the sixth section of the act of March 3, 1869, (15 Stat., 318,) promotions in that department were forbidden "until otherwise directed by law." This enactment suspended indefinitely the operation of the provision in the third section of the act of August 3, 1861, adverted to, which at length became formally repealed by section 5596 of the Revised Statutes.

I have stated that that provision was applicable only to the Regular Army. But by section 2 of the act of March 2, 1867, entitled "An act declaring and fixing the rights of volunteers as a part of the Army," (14 Stat., 434,) it was provided "that in all matters relating to pay, allowances, rank, duties, privileges, and rights of officers and soldiers of the Army of the United States, the same rules and regulations shall apply, without distinction, for such time as they may be

Promotion in the Quartermaster's Department.

or have been in the service, alike to those who belong permanently to that service, and to those who, as volunteers, may be or have been commissioned or mustered into the military service under the laws of the United States for a limited period." Here three descriptions of persons are mentioned: (1) those officers and soldiers who belong permanently to the service; (2) those who, as volunteers, *may be* commissioned or mustered into the service for a limited period; (3) those who, as volunteers, *may have been* commissioned or mustered into the service for a limited period. "For such time as they may be or *have been* in the service," so the section declares, the same rules and regulations relating to pay, allowances, rank, duties, privileges, and rights of officers and soldiers of the Army of the United States are to apply to these several descriptions of persons without distinction. The provision extends to no persons but those who are in the military service, and the inclusion of officers and soldiers who may "have been" commissioned or mustered into the service as volunteers affords ground for the construction that where officers and soldiers belonging to the Regular Army fall within the terms of that description (*i. e.*, where they have been in the volunteer service before entering the Regular Army) their past service as volunteers must be estimated in all cases in which, under the rules and regulations referred to, it would be estimated had it been performed by them as regulars.

Admitting, then, that this section might have entitled those assistant quartermasters in the Regular Army who were selected and appointed from the volunteer quartermaster service under the thirteenth section of the act of July 28, 1866, (14 Stat., 334,) to have the period of their service as volunteer quartermasters taken into account in determining their right to promotion for length of service under the provision in the act of 1861, whilst the latter was in force and operation, yet it has undergone very material modification in the revision of the statutes. Part of it appears in section 1292 of the Revised Statutes in the following form: "In all matters relating to the pay and allowances of officers and soldiers of the Army of the United States, the same rules and regulations shall apply to the Regular Army and to volunteer forces mustered into the service of the United States for a

Promotion in the Quartermaster's Department.

limited period." Part of it also appears in the 123d article of war in the Revised Statutes, in this shape: "In all matters relating to the rank, duties, and rights of officers, the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in or mustered into said service, (*i. e.*, the service of the United States,) under the laws of the United States, for a limited period." It will be perceived that in neither of these provisions is there any reference to the past service of an officer who, as a volunteer, may have been commissioned in the military service, such as is found in section 2 of the act of March 2, 1867.

Section 1292 provides simply this, that the officers and soldiers of the Regular Army and the officers and soldiers of the volunteer forces mustered into service shall, in the matter of pay and allowances, be subject to the same rules and regulations. In that matter the regular and the volunteer are to stand on an equal footing relatively to each other. The provision comes into play when there are in the military service both volunteers and regulars, and it appears to be intended for such a state of things only.

The 123d article of war does nothing more than provide that regular officers and volunteer officers shall, in the matter of rank, duty, and rights, be governed by the same rules and regulations. Like section 1292, it would seem to be only intended for a condition of the military service in which both volunteers and regulars exist as distinct organizations. Even if the provision of the act of 1861, authorizing promotion in the Quartermaster's Department for length of service therein, were still in force, this article would not, I think, confer upon an assistant quartermaster in the Regular Army, selected and appointed from the volunteers under the act of July 28, 1866, the right to have the period of his service as a volunteer assistant quartermaster counted in determining his claims to promotion under the former act.

From the above review of the statutes I deduce the following:

1. That no law now exists authorizing promotion in the Quartermaster's Department from the grade of captain to that of major for continuous service in the former grade of fourteen years. The only law of promotion applicable to this depart-

Promotion in the Quartermaster's Department.

ment which is at present in force is that relating to the filling of *vacancies* therein, hereinbefore mentioned. The latter, however, is subject to the provisions of the fourth section of the act of March 3, 1875, chap. 126.

2. That though the second section of the act of March 2, 1867, may have entitled an assistant quartermaster in the Regular Army, appointed from the volunteer forces under the act of July 28, 1866, to have the time he served as a volunteer quartermaster counted for the purpose of determining his right to promotion under the provisions of the third section of the act of August 3, 1861, yet the provisions of the former section, as modified by the Revised Statutes, do not authorize such time to be counted in his favor for any purpose. I may add here that section 1219 of the revision, which embodies the provisions of the first section of the act of March 2, 1867, authorizes such time to be computed, as between officers of the same grade and date of appointment, for the purpose of fixing their relative rank; and this is believed to be the only provision now in force authorizing the computation.

Accordingly, in direct answer to your inquiry, I have the honor to reply that, under existing law, Captain Hoyt (whose commission as assistant quartermaster is junior to the commissions of twenty-two other assistant quartermasters) has not such precedence in rank as to entitle him, upon the next happening of a vacancy in the grade of major, to promotion in preference to any other captain of less than his length of continuous service as a captain and assistant quartermaster in both the regular and volunteer forces. On the contrary, the right to promotion in such a case would, under the existing law, be governed by seniority of commission, irrespective of the past service of the officer.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

TWENTY PER CENT. ADDITIONAL DUTY.

The additional duty of 20 per cent. *ad valorem* provided by section 2900 Rev. Stat. does not accrue until, by an appraisement under that section or by a reappraisement under section 2929 Rev. Stat., it is found that the value of the goods exceeded by 10 per cent. or more their invoiced or entered value.

DEPARTMENT OF JUSTICE,

July 7, 1877.

SIR: In answer to your letter of the 3d instant, with reference to the additional duty of 20 per cent. *ad valorem*, under section 2900 of the Revised Statutes, I have the honor respectfully to say that the facts, as they appear in the letter of the collector and the letter from youself, seem in some particulars to vary. There is no difficulty, however, in answering the question proposed in either aspect.

The inquiry of your letter is as follows: "Does the additional duty of 20 per cent., prescribed by section 2900, accrue on goods which have been appraised by the appraiser at the value declared upon the entry and which, subsequently to the liquidation and payment of the duties and delivery of the goods, are found to be undervalued by 10 per cent. or more?"

I am of the opinion that (assuming all the facts in the case to be stated in this question, and that there has been no reappraisement of the goods in the case supposed) the penalty of 20 per cent. is not incurred, and this because it is only imposed in case the appraised value exceeds by 10 per cent. or more the invoiced or entered value of the goods. No such fact having appeared to the appraisers, the penalty has not been incurred. Where, however, it has come to the knowledge of the collector, subsequently to an appraisement, that the goods were appraised at less than their value, either by reason of an under-invoice or for any other reason, it is in his power, under section 2929 of the Revised Statutes, to order a reappraisement, which may be made either by the principal appraisers or by three merchants designated by him for that purpose who shall be citizens of the United States, and may proceed to charge the duties according to such reappraise-

Relative Rank in the Navy.

ment. If, upon such reappraisement, it is found that the goods exceed by 10 per cent. or more the invoiced or entered value, it is then competent for the collector to impose the 20 per cent., which is in the nature of a penalty. Of course, such reappraisement can only take place when the goods are in such position that they may be properly examined; but the mere fact that there has been a formal delivery, and that in addition thereto the duties have been liquidated or paid, would not interfere with such reappraisement. There appears to be no law by which an additional duty of 20 per cent. *ad valorem* can be imposed, unless it has been found by an appraisement (either original or a reappraisement) that the goods exceeded by 10 per cent. or more the invoiced or entered value.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

RELATIVE RANK IN THE NAVY.

In estimating length of service, for the determination of precedence with other officers with whom they have relative rank, engineer officers of the Navy who are graduates of the Naval Academy are not entitled to the six years' constructive service allowed to other staff officers of the Navy for that purpose. Section 1484 Rev. Stat. is to be construed as an exception to section 1486 Rev. Stat., operating to exclude from the provisions of this last section such engineer officers.

But engineer officers not graduated at the Naval Academy stand on the same footing with other staff officers, and are entitled to the six years' constructive service.

DEPARTMENT OF JUSTICE,
July 11, 1877.

SIR: In answer to your inquiry of the 7th instant upon the following question, "Whether, in estimating length of service, for the determination of precedence, engineer officers, graduates of the Naval Academy, are entitled to the benefit of the six years allowed to other staff officers of the Navy," I have the honor to say:

By the statute of March 3, 1871, (which is embodied in section 1486 of the Revised Statutes,) it was provided that, "in estimating the length of service for such purpose," (namely,

Relative Rank in the Navy.

that of precedence,) "the several officers of the staff corps shall, respectively, take precedence in their several grades and with those officers of the line of the Navy with whom they hold relative rank who have been in the naval service six years longer than such officers of said staff corps have been in said service."

This provision, which gave the benefit of six years of constructive service in determining the question of precedence among officers, was undoubtedly intended to equalize the officers of the staff with those of the line by a provision which would give them, in determining the question of rank, a period which would be supposed ordinarily to answer to the time which was expended by the line officers in their education, and before their proper duties as officers commenced. Were it not for some such provision, the officers of the line would have an advantage over those of the staff in this, that the period of their education would be counted in determining their precedence as the term of their service. As, according to the construction which had been given to the regulations of the Navy, six years were expended by the line officers in their education, it was undoubtedly deemed proper to fix this as the time which should be given to the staff officers, in order to equalize them with the line officers.

At this time certain cadet-engineers were educated at the Naval Academy, but then had only a term of education amounting to two years. This term was subsequently increased to four years; and it was, of course, observed that, if the engineer officers graduated at the Naval Academy were entitled to have, in determining the question of rank, the constructive service of six years, they would obtain too great an advantage over the line officers, because the term of their education would be counted as a term of service, while, in addition, they would have what may be termed the fictitious or constructive term of service allowed to the officers of the staff corps. The act of March 3, 1873, therefore, provided that "engineer officers graduated at the Naval Academy shall take precedence with all other officers with whom they have relative rank, according to the actual length of service in the Navy." While, therefore, in the Revised Statutes section 1484 precedes section 1486, it is in fact a limit-

Mail-Wagon.

ation or exception to section 1486; and, when thus read together, it will be seen that all staff officers are entitled to the benefit of the six years' term of service, with the exception of those engineer officers who graduate at the Naval Academy, and whose term of service, like that of the line officers, begins at the commencement of the period of their education, and not, as with other staff officers, at the time when they actually enter upon their staff duties.

The staff officers entering from civil life have actually an advantage over the engineer officers who graduate at the Naval Academy in reference to this matter of rank in this respect, that six years' constructive term of service is allowed to them as compensation for the time which is spent in education by other officers, when, in point of fact, only four years is actually expended by engineer officers in the term of their education; but, notwithstanding this discrepancy, it is apparent, upon construction of the statutes, that the staff officers, with the exception of engineer officers graduating at the Naval Academy, are entitled to the constructive term of service of six years in determining precedence, and that the engineer officers graduating at the Naval Academy are not entitled to this constructive term.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,

Secretary of the Navy.

MAIL-WAGON.

A wagon, employed by its owner in transporting the mail from point to point within the city of Baltimore, is not exempt from local taxation by reason of its employment in the mail service.

DEPARTMENT OF JUSTICE,

July 25, 1877.

SIR: On examination of the case presented by Mr. Wallace Owings to your Department, and referred to me by your communication of the 16th instant, I have respectfully to say that, while the facts are not very fully stated in Mr. Owings's communication, I infer from them that the property assumed to be taxed by the corporate authorities of the city of Baltimore

Mail-Wagon.

is properly included within the law regulating the taxation of vehicles in that city; that it is the private property of Mr. Owings; and that it is not exempt from taxation, unless it becomes so by the fact that it is a mail-wagon, used for the purpose of transporting the mails from point to point in that city.

There is no doubt that the power to tax all property, business, and persons within the respective limits of the various States was originally with them, and has never been surrendered. It cannot be so used, however, as to hinder or defeat the operations of the National Government; but it is to be understood, in reference to persons and State corporations employed in Government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to the objection that it thus hinders or defeats the operations of the Government. (*Thomson vs. Pacific Railroad*, 9 Wall., 59.)

In the case of *Railroad Company vs. Peniston* (18 Wall., 5) it was held that a tax upon the property of a railroad merely, having no necessary effect to prevent parties from serving the Government, and leaving them free to discharge the duties they had undertaken to perform, might rightfully be laid by the States, while a tax upon their operations, being a direct obstruction to the exercise of the Federal powers, could not be. It is said by Mr. Justice Strong, in delivering the judgment of the court, that it may be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the Government, merely because it is the property of such agent. He suggests that a very large portion of the property within the States is employed in the execution of the powers of the Government—that the United States mails, troops, and munitions of war are carried upon almost every railroad, and yet this does not exempt such railroads from taxation.

I am therefore of opinion (assuming the facts to be as suggested in the earlier part of this letter) that the property of Mr. Owings is properly subjected to taxation by the corporate authorities of Baltimore.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,

Postmaster-General.

Indemnity to States for Swamp Lands.

INDEMNITY TO STATES FOR SWAMP LANDS.

The Commissioner of the General Land Office is authorized to receive proofs of the swampy character of lands disposed of by the United States between March 2, 1855, and March 3, 1857, with a view to allowing the States the indemnity provided by the act of March 3, 1857, chap. 117, notwithstanding the omission in the Revised Statutes (section 2484) of that part of the act which granted the indemnity.

The right to indemnity, under that act, for swamp lands thus disposed of, is a right that "accrued" to those States in which such lands are situated prior to the adoption of the Revised Statutes, and is saved by section 5597 Rev. Stat. from being affected by the repeal of the omitted indemnity provision under the operation of section 5596 Rev. Stat.

DEPARTMENT OF JUSTICE,

July 25, 1877.

SIR: By your letter of the 10th instant I am informed that by the act of Congress approved September 28, 1850, (9 Stat., 519,) all of the swamp and overflowed lands made thereby unfit for cultivation, remaining then unsold, were granted to the several States then in the Union in which such lands were situated. Next the act of March 2, 1855, (10 Stat., 634-5,) was passed, authorizing the President to cause patents to be issued to the purchasers and locators of lands claimed as swamp, and granting indemnity to the several States in which lands had been sold upon proof of the swampy character of the same. Congress subsequently, by an act approved March 3, 1857, (11 Stat., 251,) confirmed to the several States the lands theretofore selected and reported to the Commissioner of the General Land Office as swamp lands, so far as they remained vacant and unappropriated, and directed that patents be issued for the same, and by the same act extended the provisions of the act of March 2, 1855, as to all entries and locations made after its passage. Under the act of March 3, 1857, it was held that the several States were entitled to indemnity for all swamp and overflowed lands within their respective boundaries sold by the United States between March 2, 1855, and March 3, 1857, (11 Opin., 467.) The Revised Statutes, section 2482, embodies the substance of the act of March 2, 1855, including the indemnity clause, but authorizes the Commissioner of the General Land Office to receive proof

Indemnity to States for Swamp Lands.

only of sales of swamp land made by the United States prior to March 2, 1855. Section 2484 contains the substance of so much of the act of March 3, 1857, as confirms to the several States the selections made before that date, but it does not contain the clause continuing in force the indemnity provision of the act of 1855.

Upon this state of the law, the question arises whether the Commissioner of the General Land Office is now authorized to receive proofs by the authorized agents of the several States of the swampy character of lands purchased from the United States between March 2, 1855, and March 3, 1857, with a view to furnishing to the States the indemnity which was provided by the act of March 3, 1857.

Section 5596 of the Revised Statutes provides that all acts of Congress passed prior to the 1st day of December, 1873, "any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

This section is, however, itself limited by section 5597, which provides: "The repeal of the several acts embraced in said revision shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause, before the said repeal, but all rights and liabilities under said acts shall continue and may be enforced in the same manner as if said repeal had not been made."

The answer to your question therefore depends upon the question whether the indemnity clause, which was provided by the act of March 3, 1857, must be deemed to be a right accrued before the revision. If so, the fact that it is omitted in the revision becomes unimportant.

I am of opinion that the right to indemnity for the swamp lands sold or transferred by the United States previous to March 3, 1857, must be deemed a right accrued to those States in which such lands were situated, and that they are now entitled to the compensation provided by that act. The grant had been made to the several States of these lands; and inasmuch as subsequent sales or transfers of the lands had been made by the United States, it was a sale or transfer of lands which had been previously granted, and the provis-

Department Files—Recommendations for Office.

ion of indemnity was a provision intended thus to carry into effect the original grant. It will be seen also, upon examining the two statutes of March 2, 1855, and March 3, 1857, that the object of such statutes was to enable the United States itself to give sufficient titles to those persons who had located upon the lands, or to whom the lands had been sold by them subject to the grant to the States under the act of September 28, 1850, and that under this act the States parted with the valuable right to these lands in order that the United States might complete the title of *bona fide* purchasers from them, and in lieu of the lands accepted the indemnity contemplated by the acts of March 2, 1855, and March 3, 1857. This seems to me quite conclusively to settle that the indemnity clause of the act of March 3, 1857, conferred upon the several States to which it related a right, and that when subsequently the statute of March 3, 1857, is embodied within the revision, it was unnecessary to add to it the indemnity clause, because the omission of such clause could not affect the right which had accrued to the States. It is true that in section 2482, embodying the substance of the act of March 2, 1855, the indemnity clause is retained; but the mere fact that it is thus retained in the section embodying the act of March 2, 1855, cannot affect the appropriate construction of section 2484, which contains the substance of the act of March 3, 1857.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. CARL SCHURZ,
Secretary of the Interior.

DEPARTMENT FILES—RECOMMENDATIONS FOR OFFICE.

Recommendations for office are not papers or documents which are required to be kept by the Departments in which they are deposited. They are placed on file therein for the convenience of applicants for office, who are allowed to withdraw them whenever they desire to do so. Such applicants can properly be permitted to see objections that have been filed against themselves (subject to the limitation, however, that the permission should only be given where the communication is not in its nature privileged), in order that they may, if possible, answer or remove them. But the privilege should not be extended further; as

Department Files—Recommendations for Office.

all is done that justice requires when a party is permitted to see any objections filed against himself.

Accordingly, where application was made to the President, on behalf of a newspaper, for permission to examine the files of the Executive Departments with a view to ascertain what persons have been recommended for office by a certain Senator and Representative in Congress (the purpose being to establish from such examination the fact that improper persons have been thus recommended by the Senator and Representative named): *Advised that the Department files ought not to be submitted to a search of that character.*

Nor should copies of recommendations and papers of this nature be furnished in any case, unless the applicant appears himself to have been directly affected by the writing of which a copy is applied for.

DEPARTMENT OF JUSTICE,
July 28, 1877.

SIR: In answer to your indorsement upon the application of Mr. Talcott Williams, on behalf of the San Francisco Chronicle, for permission to examine the files of the Executive Departments with a view to ascertain who and what persons have been recommended for office by Senator Sargent and Representative Page, which communication of yours inquires as to the legality and propriety of a compliance with the request, I have the honor respectfully to submit:

The provision for the custody of the records of the various Departments is found in section 161 of the Revised Statutes, which provides that "the head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, * * * and the custody, use, and preservation of the records, papers, and property appertaining to it."

Certain files of the Executive Departments have definitely the character of public records, and to copies of these parties interested are entitled upon payment of the fees prescribed. The most important of such files are the patents for useful inventions and the patents for lands. (See Rev. Stat., sections 213, 459, 460, 461, 515, 802, &c.)

By section 882 it is provided: "Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."

Marshal's Fees.

DEPARTMENT OF JUSTICE,
July 28, 1877.

SIR: In reply to your letter of the 26th instant, inquiring, in the case of the Lakeside Library, whether that is to be considered as within the intendment of the term "periodical publication," as employed in the various statutes as to classification of mailable matter, I have the honor to say:

The question submitted by you seems to be either a question purely of fact or a mixed question of law and fact. The proper definition of "periodical publication" seems to me to be substantially this: every printed literary paper, printed and published periodically in parts or numbers at definite intervals. If this be a correct definition, the facts indicate that this is a periodical publication. Each paper, while it bears no date, has a distinct number. It is published at regular intervals, three times a month, and while it is intended that each number shall be complete in itself, and it is so advertised, this rule, on an examination of the paper, is found not to be invariable, and occasionally articles are continued from one number to another. It is, as required by section 5 of the act of June 23, 1874, (18 Stat., 232,) a publication addressed to news agents, and is claimed by the proprietor also to be addressed to regular subscribers, although he admits that the number of regular subscribers is comparatively few, sale of the magazine being generally in individual numbers.

When addressed to news agents or regular subscribers, I am of opinion that it is entitled to pass at the rate of postage prescribed for "periodical publications."

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

MARSHAL'S FEES.

Under section 829 Rev. Stat. the marshal for the district of Kentucky, in a case where proceedings are stayed after levy of an execution, and no moneys are collected thereon, is entitled to charge the half commissions allowed by the law of Kentucky to a sheriff in such a case.

Marshal's Fees.

Where the marshal who levied the execution has received his half commissions, his successor will be entitled to no more than half commissions for completing the collection and paying over.

DEPARTMENT OF JUSTICE,

June 30, 1877.

SIR: I have the honor to acknowledge the receipt of your letter of July 23, inclosing a communication from the Comptroller, which requests my opinion as to the propriety of a certain charge by the United States marshal for the district of Kentucky.

The charge is 3 per cent., or one-half commissions, on a sale under a *renditioni exponas* in a suit in which the United States are plaintiffs, stayed until further orders from the United States attorney and the defendants; the marshal having now gone out of office.

These commissions are claimed under the United States act of February 26, 1853, (Rev. Stat., sec. 829), and the Kentucky act of February 4, 1865, allowing the half commissions in question. The act of Congress allows United States marshals for making the service of any final process, "seizing or levying on property, advertising and disposing of the same by sale, set-off, or otherwise according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the States, respectively, in which the service is rendered."

There is a slight error of punctuation in the report of this provision in the Revised Statutes which does not exist in the act as originally printed, (10 Stat., 164); the omission of the comma after "according to law." As correctly printed, the clause "receiving and paying over the money" is only an additional specification of the services for which marshals are to be allowed the same fees and poundage as are allowed to State sheriffs.

I cannot view this clause as intended to deprive marshals of their right to the fees and poundage allowed to State sheriffs where moneys have not been actually collected. The manifest intention of the act is to put United States marshals in regard to compensation on the same footing in all respects with the sheriffs of the States where the services are rendered. In the case stated the only questions can be, (1) does the law of

Disbursing Agents for Light-Houses.

Kentucky allow poundage where the proceedings have been stayed after levy of execution, no moneys having been collected † and, if so, (2,) what is the rate of poundage allowed † Since the law of Kentucky does allow poundage in such case, and in the form of one-half commissions on the amount of the judgment, I thiuk this is decisive of the propriety of the charge in question. The act of Congress allows marshals serving in Kentucky both the fees *and poundage* allowed to the sheriffs of that State; but the fee-bill of Kentucky (Gen. Stat., p. 460) makes no other provision for poundage whatever than this: that when the judgment is collected, it shall consist of 6 per cent. commissions, and where, after a levy of execution, proceedings are stayed, of one-half commissions, or 3 per cent.

It may be proper to add that in no case can more than full commissions be taxed to a sheriff or marshal in one and the same suit; and that, consequently, where the marshal who levied the execution has received his half commissions, his successor will be entitled to no more than half commissions for completing the collection and paying over.

I have the honor to be, very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

DISBURSING AGENTS FOR LIGHT-HOUSES.

Collectors of customs, whose compensation does not exceed \$3,000 a year, are entitled, (under section 4672 Rev. Stat.,) when acting as superintendents and disbursing agents for light-houses, to compensation for their services as such disbursing agents, the amount whereof is to be determined by the Secretary of the Treasury, but is not to exceed \$400 in any fiscal year.

DEPARTMENT OF JUSTICE,
August 2, 1877.

SIR : In answer to your letter of the 30th ultimo, upon the subject of compensation to collectors of the revenue while acting as superintendents of light-houses, I have the honor to say :

The enactments which commence May 18, 1842, by which

Disbursing Agents for Light-Houses.

the commission of superintendents of lights was fixed at $2\frac{1}{2}$ per cent., and which were continued from time to time until June 30, 1874, concerned only the individual appropriations made from year to year, and were not general statutes. They therefore, except immediately under such appropriations, gave no right to collectors acting as superintendents of light-houses to receive this compensation.

By the Revised Statutes, which went into effect on June 22, 1874, (sec. 4672,) it was provided that where the compensation of any collector, acting as disbursing agent for light-houses, was not more than \$3,000 a year, such officer should receive for services as disbursing agent not more than \$400 in any fiscal year. The provision undoubtedly gave to a collector acting as superintendent of lights the right to a compensation for his services as disbursing agent. It did not entitle him to any fixed sum, but left the matter of his compensation to be determined within the maximum of \$400 each fiscal year by the Secretary of the Treasury. While no appropriation has since been made for the compensation of collectors for services as disbursing agents, yet the effect of the statute is to entitle them to such compensation. The amount thereof is to be determined by the Secretary with reference to the amount of money paid over by the collector in disbursing as superintendent of lights, having regard also to the greater or less inconvenience attending the performance of such duty. While no rule is laid down for the Secretary, yet appropriations for many years having provided that the agent should receive a compensation equal to $2\frac{1}{2}$ per cent., this would, under ordinary circumstances, seem to be a convenient and just rule to be adopted by the Secretary, it being of course understood, as before stated, that the maximum compensation to be received by such collector for services as disbursing agent cannot exceed the sum of \$400. While the amount of compensation to be paid or allowed is to be ascertained by the Secretary of the Treasury, it is probably unnecessary to add that such amount cannot be paid until Congress shall have made an appropriation for the purpose.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

Case of Messrs. Vann and Adair.

CASE OF MESSRS. VANN AND ADAIR.

In 1868, A. and V. made a contract with the Osage tribe of Indians, by which they were to receive one-half of what should be secured to the tribe by reason of their services in preventing the ratification of a treaty affecting lands of the tribe. After the ratification had been defeated that contract was relinquished, and in 1873 a new one was made, by which the sum of \$230,000 was agreed to be paid A. and V. This contract having been submitted by these parties to the Commissioner of Indian Affairs and the Secretary of the Interior "for payment of the whole amount thereof, or for so much as they might deem just and equitable in the premises," was approved by the Commissioner and Secretary for the sum of \$50,000, which was accordingly paid. Subsequently, on application of A. and V. to the Indian Department to reopen the case; the Secretary of the Interior refused to make any further allowance. On petition of the governor and council of the Osages in behalf of A. and V., asking the President to direct a further allowance of the claim: *Advised* that the petition cannot with justice or propriety be granted by the President, (1) because his power to order the payment is (for reasons stated in the opinion) of doubtful legality: (2) because the same claim was submitted by the parties to the Interior Department and an award made thereon, which has been paid; (3) because at a subsequent time it was reopened and the same decision reached; (4) the matter is now *res adjudicata*.

DEPARTMENT OF JUSTICE,

August 7, 1877.

SIR: Referring to the letter of the 30th ultimo, from Private Secretary Rogers, submitting to me the petition of the governor and council of the Osage Indians, together with other papers connected with the subject-matter of the petition, and requesting an opinion as to whether it is right and proper that the President should comply with the desire of the petitioners, I have the honor to reply:

The petition, although dated in May, 1877, refers to a matter which has long been under discussion before the Executive and the Departments. It is a claim by Messrs. Vann and Adair for services rendered in preventing the ratification of a proposed treaty of 1868, by which the Osages were liable to be deprived of the full value of their lands, and thus securing to those Indians the benefits to which they were entitled under a treaty of 1865, which services, it is claimed, were of very great value, and resulted in maintaining the Osages in

Case of Messrs. Vann and Adair.

their right to more than \$5,000,000. These services were rendered under a contract with the Indians that the claimants should receive one-half of the amount gained or secured by reason of their services, which contract is alleged to have been made some time in 1868. At a subsequent period, and after the refusal to ratify the proposed treaty of 1868, (it having been found that the amount thus secured to the attorneys was far larger than it was supposed it would have been, either by themselves or the Indians,) this contract was relinquished and a new one was made, by which \$230,000 was agreed to be paid. This latter contract was ratified June 26, 1873, and was therefore subsequent to the laws of March 3, 1871, and May 21, 1872, which are incorporated in section 2103 of the Revised Statutes. It received, however, the approval of the Secretary of the Interior and Commissioner of Indian Affairs for the sum of \$50,000, which sum the claimants have received.

These Indians (like other tribes of Indians) are to be treated as dependent nations, and their relation to the Government is that of wards. It has been heretofore held that contracts made with tribes for valuable services to be rendered such tribes may be ratified and approved so as to give them validity, or may be entirely rejected. It is necessary, however, that such contracts should comply with the laws; and, if this contract is to be decided by the law as it is enacted in section 2103, it has now been fully and completely complied with, the full sum which was awarded having been paid. It is, however, said that the transaction of June 26, 1873, was not properly a contract, but a settlement of a former contract merely, and that the claimants are entitled to have their claim adjudicated as it stood under the contract made by them previous to this settlement. It is, however, to be observed that the claimants have had the full benefit of the transaction of June 26, 1873, as a contract; that they have treated it as such; and that they have received money as such under it. They cannot now treat it otherwise.

Even, however, if the contract as originally made may be ratified, I find much difficulty in deciding that there is any authority on the part of the President to pay the amount therein stipulated from the funds over which he has control,

Case of Messrs. Vann and Adair.

and which are placed under his authority by the statute of 1870. This statute enacts that the United States, in consideration of the relinquishment by said Indians (the Osages) of their lands in Kansas, shall pay annual interest on the amount received as proceeds of the sale of said lands at the rate of five per centum, "to be expended by the President for the benefit of such Indians in such manner as he may deem proper." From the authority thus reposed in the President I do not think that it appears that he has any legal right to pay antecedent debts with the five per cent. which he may thus expend "in such manner as he may deem proper." The fund which is placed to the credit of the Osages by this act in the Treasury he certainly cannot diminish; and, whatever treaties may have been made with the Indians, his authority to dispose of the income is to be found in this statute, by which his duties as Chief Executive are prescribed. An authority to pay the annual interest for the benefit of the Indians cannot fairly be interpreted as an authority to pay their antecedent debts. Its extreme limit would seem to be to pay the debts of the tribe which have accrued since the trust was placed in his hands when the forms of law have been complied with, and when actual benefit has been received by the tribe, after the income was thus at his disposition. The only mode in which antecedent debts could be paid would be by charging them upon the annuity, and before such debts could be thus charged it would seem that some direct authority should be found authorizing him so to do.

I should therefore be prepared to say that it is not within the legal power of the President to direct the payment of this claim, were it not that Judge Pierrepont, in an opinion delivered upon this subject as Attorney-General, has held that if the facts justified such a payment the law would authorize it. Mr. Evarts, also, as counsel, has expressed a similar opinion. In view of these opinions, without saying decidedly that the President has not the legal authority in question, I content myself with simply saying that it is doubtful whether he has such authority.

Perhaps this is sufficient in the present case, as there are other reasons than those connected with the legal power of

Case of Messrs. Vann and Adair.

the President which seem to me to quite strongly show that, even if it exists, it should not be exercised in favor of the claimants. After the contract of June 26, 1873, was made, the whole matter was submitted to the Commissioner of Indian Affairs and the Secretary of the Interior in July, 1874, "for payment of the whole amount thereof, or for so much as they might deem just and equitable in the premises." Upon this the Commissioner recommended "that the contract be approved for the sum of \$50,000, to be paid these attorneys *in lieu of all claims* for past services for the Osage Nation," and it was approved for that amount. The sum thus allowed was paid to the attorneys, and received by them, not upon account, as is argued by their counsel, but as their claim for services rendered the Osage Nation. This transaction, therefore, in its whole character was in the nature of a submission by the parties and an award upon this submission; and upon the receipt of their money it became an executed award, and they have no further claim for their services. Whether or not the \$50,000 could properly have been paid was a subsequent matter of discussion. It appears (upon examination of the books at the Treasury, and of a report made by the Acting Secretary to the Senate in answer to a resolution of that body) to have been paid under a provision "that the Secretary of the Interior be, and hereby is, authorized to expend from the proceeds of the sale of the lands of the Great and Little Osage Indians, provided to be sold by section 12 of said act of July 15, 1870, the sum of \$200,000 per annum for two years, or so much thereof as may be necessary for the purchase of stock and agricultural implements, opening farms, erection of houses, and for the civilization and support of the Osages and their tribal government." It is unnecessary here to consider whether, under such an appropriation, this sum of \$50,000 could properly have been paid. It was, in point of fact, paid; and the claimants at least cannot treat the transaction as anything but an award by the Commissioner and Secretary, to which they submitted, and of which they have had the full benefit.

At a subsequent period, the claimants pressed a reopening of this case in the Indian Department, and the Secretary, on December 7, 1875, refused to make any further allowance,

Case of Messrs. Vann and Adair.

holding that the practice of paying such claims out of the Indian trust fund was a vicious one, and should thereafter be wholly discontinued.

At a subsequent period, on July 8, 1876, in answer to a resolution of a committee of the House of Representatives, requesting that the Secretary of the Interior lay before the Attorney-General the facts in his possession, obtain his opinion as to the legality of this claim, and communicate to the committee said opinion, the Department of the Interior declined, upon the facts before it, to again reopen the case, alleging that, in its opinion, it now plainly appeared that no payment of any amount should ever have been made to these claimants.

In connection with the subject of the proceedings before the Department of the Interior, I ought also to call attention to a resolution passed by the Board of Indian Commissioners on July 29, 1875, to the effect that, if any payment was justifiable, the payment of \$50,000 was ample for the services alleged to have been rendered by Messrs. Vann and Adair, and, further, that the papers in the said claim be returned to the Department with the disapproval of this board, and the earnest recommendation that no further payment be made.

It therefore fully appears that this matter has been twice completely and fully adjudicated in the Department of the Interior against the claimants. The mere form in which it is now presented—as a petition to the President directly—can make no difference. The substance of the matter is the same, and it has twice been distinctly passed upon by the Interior Department, which, within its sphere, represents the President. There is no rule of administration better settled than that when a matter has once been fully and distinctly decided in an Executive Department, it is not consistent with propriety to reopen it, unless new evidence and new facts are presented. All the facts in the case were of course known to the claimants at the time that they made their original application to the Department of the Interior. It was said by Mr. Wirt “to be a rule of action prescribed to itself by each administration to consider the acts of its predecessors conclusive, so far as the Executive is concerned.” (2 Opin., 9.) This rule has been so often restated by this Department, and has been

Compensation of Customs Officers.

so generally adhered to, that it is unnecessary to encumber this opinion with citations. Without it, it is obvious that a claim may be again and again presented for consideration until all the acts of his predecessors have to be reviewed by each successive Department officer, and claims thus forced through the Departments by persistency, or because, from time to time, evidence is lost upon which the original decisions against claimants were made.

At a period subsequent to the final rejection of this claim by the Department of the Interior the claimants resorted to Congress for the purpose of obtaining relief. If they are entitled to relief, this is the only place where, it seems to me, it can now be obtained.

Upon the whole case, I therefore respectfully suggest to the President that no rule of justice or propriety requires the granting of this petition: first, because his power to order the payment of the sum is of doubtful legality; second, because the same claim was submitted by the attorneys to the Department of the Interior, and an award made thereon which has been fully paid; third, because at a subsequent time it was reopened, and the same decision reached.

I have not considered it necessary to determine or pass upon the question of what was the actual value of the services rendered by the attorneys.

I have added to the papers submitted to me by Mr. Rogers copies of the decisions of the Department of the Interior and of the resolution of the Board of Indian Commissioners to which I have referred, as well as two additional arguments furnished by General Ewing.

Very respectfully, your obedient servant,
CHAS. DEVENS.

The PRESIDENT.

COMPENSATION OF CUSTOMS OFFICERS.

A special deputy (without compensation as such), constituted by the naval officer at the port of New York, under section 2632 Rev. Stat., to perform the duties of the latter in cases of occasional and necessary absence or of sickness, may at the same time be appointed to a clerkship in the office of such naval officer, and be allowed, under section 2745 Rev. Stat., a compensation for his services *as clerk* greater in

Compensation of Customs Officers.

amount than that affixed by law to the permanent office of deputy naval officer at the same port, provided it do not exceed the rate usually paid for similar services. This case distinguished from the cases considered in the opinion of June 4, 1877.

DEPARTMENT OF JUSTICE,

August 9, 1877.

SIR: In answer to your letter of the 4th instant, in which you say that you desire to restore the compensation of \$5,000 formerly received by Mr. Silas W. Burt, as clerk in the naval office at New York, under the provisions of section 2634 of the Revised Statutes, if, in my opinion, it does not conflict with my decision rendered under date of June 4, last, which has been adopted by the Department, I have the honor to say:

In that opinion it was held by me that officers performing the duties of a position to which Congress had annexed a definite salary should not be appointed to such position without compensation and then be appointed clerks at a salary other than that provided for such officers under the general authority given to the Secretary of the Treasury to fix the pay of clerks at the port of New York, such pay not to exceed the rates of compensation usually paid for similar services.

With that opinion I remain satisfied, and the only question, therefore, is as to its application to the case of Mr. Burt.

The duties performed by that gentleman I learn from his letter addressed to yourself under date of June 8, last, which I assume to be correctly stated. It appears that he has no appointment as a general deputy naval officer. He has a special appointment from the naval officer, which authorizes him to act in his stead in cases of occasional and necessary absence, or of sickness, and not otherwise. This appointment is not one of the fixed and permanent offices of the port, and has never been confirmed by the Department. It is treated, therefore, as a duty individual in its character, and intended merely to relieve the naval officer himself in the cases referred to. It is not intended by it, as I understand, that he shall perform the duties ordinarily performed by a deputy naval officer. There are two classes of deputy collectors, deputy surveyors, and deputy naval officers; the one

Unexpended Balances of Appropriations.

with fixed and definite duties, which continue the same whether the chief officer is present or absent, and whose offices are permanent in their character; the other special, and intended simply to provide for the performance of the duties of such officer in case of inability on his part. The duty performed by Mr. Burt is of the latter character, while his general duty is that of a clerk of the highest class, if I rightly understand what is included in the term "comptroller," whom I take to be a supervising officer of a large portion of the accounts and clerical work of the office. Such a clerk may properly have his compensation fixed by the Secretary of the Treasury at a rate which he deems appropriate, provided it is not higher than would be paid elsewhere for similar services. (Rev. Stat., sec. 2745.) The salary to be fixed should be graduated according to the general duties performed by such clerk, and any occasional and special service which he may perform as a deputy naval officer should be regarded as incidental only.

In this aspect of the facts of this case, I am of opinion that the Secretary of the Treasury may properly determine the compensation of Mr. Burt as clerk, and that, in connection with his clerical duties under the title of comptroller, he may also from time to time, as occasion may require, perform the duties of deputy to the naval officer, receiving no compensation for such duty.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

UNEXPENDED BALANCES OF APPROPRIATIONS.

Under section 5 of the act of June 20, 1874, chap. 32³, it is the duty of disbursing officers, with whom funds have been placed for disbursement, when the time arrives at which unexpended balances of the appropriations from which such funds were drawn lapse, to repay the funds remaining in their hands, in order that they may be carried to the surplus fund and covered into the Treasury.

Where, previous to that time, these officers have issued certificates by which claims upon such appropriations have been definitely ascertained, and payment thereof has not actually been made before that time, such

Unexpended Balances of Appropriations.

claims may thereafter be paid by them out of the proper funds remaining in their hands.

For what period and to what amount such officers should be allowed to retain in their hands funds for that purpose, after the date when unexpended balances of the appropriation lapse, is a matter of administration, falling within the province of the Secretary of the Treasury to regulate.

DEPARTMENT OF JUSTICE,
August 10, 1877.

SIR: In answer to your letter of the 6th instant, inquiring in relation to "funds in the hands of disbursing officers belonging to appropriations which lapsed into the Treasury on June 30, 1877, and under the surplus fund act of June 20, 1874, (18 Stat., 110, sec. 5.)" I have the honor to say:

Although funds have been paid from the Treasury into the hands of disbursing officers, if they have not been paid out, or have not been expressly set aside for the payment of debts which have been ascertained and determined, when the time arrives at which the unexpended balances of appropriations lapse into the Treasury, it will be the duty of the disbursing officers to repay such funds, that they may be carried to the surplus fund and thereafter covered into the Treasury.

The mischief intended to be remedied by the surplus fund act of June 20, 1874, was that of permitting appropriations to continue available for the payment of the debts or claims for which they provided for a long period after such appropriations were made, and was intended to fix a definite period within which the appropriations should be used or the unexpended balances carried to the surplus fund. If the disbursing officers were permitted to retain the funds which are in their hands after the arrival of such period, the object of the law would be to a certain extent defeated, as the funds would continue available for a longer period than was intended.

It would not be competent, therefore, for the disbursing officers to continue to issue certificates payable from the balances in their hands after the date when they lapse into the Treasury. If, however, previous to that time they should have issued certificates by which claims upon these appropriations have been definitely determined and decided, and the parties in whose favor the certificates are issued are enti-

Deposit of Public Moneys.

tled to their money, although the payment has not actually been made before the date referred to, such claims may thereafter properly be paid by the disbursing officers. The issuance of these certificates is a definite ascertainment of the claims which are expressed by them, and the mischief intended to be remedied by Congress—namely, that of permitting appropriations to remain available after a definite period—would not exist in the case supposed, because before such period arrived there would have been a distinct setting aside of such portions of the appropriations.

For what period the disbursing officers should be allowed to retain in their hands funds for the purpose of meeting the certificates issued by them previous to June 30, 1877, is a matter of administration only. While they continue to hold the same, of course the amount to be carried to the surplus fund cannot be accurately ascertained and covered into the Treasury. To permit them to hold such funds for an indefinite period would, therefore, be impossible. It is for the Secretary to prescribe such a rule in regard to the amount to be retained by the disbursing officers as shall seem proper in view of the information which he may receive as to the amount in full of such certificates, and, further, to prescribe how long they may retain such sums, and within what time they must be paid into the Treasury.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

DEPOSIT OF PUBLIC MONEYS.

The Secretary of the Treasury has authority to deposit the moneys received by the sale of bonds under the acts of July 14, 1870, chap. 256, and January 14, 1875, chap. 15, with public depositaries designated and selected by him under the provisions of section 5153 Rev. Stat., taking such security as the statute requires.

DEPARTMENT OF JUSTICE,

August 30, 1877.

SIR: In answer to yours of the 29th instant, I have the honor to say that by the refunding act approved July 14,

Deposit of Public Moneys.

1870, the Secretary of the Treasury is authorized to sell bonds of a certain character at not less than their par value for coin, and that under the resumption act approved January 14, 1875, he is authorized to sell similar bonds at not less than par in coin; and the question is now presented whether the money received by the sale of such bonds under said acts may be deposited with public depositaries selected under the national bank act, in pursuance of the authority conferred by sec. 5153 of the Revised Statutes. That section is as follows:

“All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue or for loans or stocks.”

By this section it is therefore provided that all national banking associations designated by the Secretary of the Treasury for that purpose shall be depositaries of the public money, that they may also be employed as financial agents of the Government, and that they are obliged to perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The other provisions of the section are not necessary to be here considered, as they embrace matters of detail as to the mode in which the duties are to be performed.

The provisions of this statute are so explicit that it is hardly susceptible of more than one construction. It permits the Secretary to designate national banks as depositaries with

Deposit of Public Moneys.

the exception referred to, it authorizes him to employ them as financial agents of the Government, and it compels them to perform all reasonable duties as depositaries of public money and financial agents of the Government.

As, however, it is not always possible to arrive at the true construction of a single provision without considering the subject-matter to which it refers, and the legislation upon the whole subject, I briefly examine that, for the purpose of ascertaining whether the most obvious meaning of the section is its true meaning.

By the act of August 6, 1846, the only depositaries of public money were the Treasurer of the United States, the assistant treasurers, and the treasurers of the mint and its branches. No provision was made for other depositaries until the act of February 25, 1863, by which it was provided (sec. 54) "that the Secretary of the Treasury is hereby authorized, whenever, in his judgment, the public interest will be promoted thereby, to employ any of such associations" (national banks) "doing business under this act, as depositaries of the public moneys, except receipts from customs."

The exception was probably introduced for the reason that at the time of this enactment the only receipts in coin were those from customs duties. This act, by virtue of which national banks were created, was re-enacted on June 3, 1864, with certain important differences; and it is from this latter act that the section 5163 of the Revised Statutes, above quoted, is drawn. While the earlier statute only authorizes the national banks to be used as depositaries of the public moneys, it will be observed that the later statute gives to the Secretary a larger power in reference to that which he may require of the national banks, and imposes upon them the duty of performance. The legislation referred to in its progress therefore seems to contemplate that these banks may be used as financial agents of the Government whenever and to the extent which the Secretary deems it expedient to employ them.

In answer to your inquiry, I have therefore the honor to say that the Secretary of the Treasury, if he deems it expedient as a matter of administrative policy, may sell bonds under the acts known as the "refunding" and "resumption"

Soldiers Detailed for Special Service.

acts, depositing the amounts received therefrom with such public depositaries as he may select under the national bank act, taking such security as is required by the statute.

Very respectfully, your obedient servant,

CHAS. DEVENS

Hon. JOHN SHERMAN,

Secretary of the Treasury.

SOLDIERS DETAILED FOR SPECIAL SERVICE.

Section 35 of the act of March 3, 1863, chap. 75, forbids the allowance of extra-duty pay to soldiers who are detailed for special service.

An order which relieves a soldier from duty in his company, but requires him to immediately report for duty in another branch of the military service, is not a furlough, (though it be so styled in the order,) but is essentially a detail for other duty, and must be treated as such.

The Secretary of War can release a soldier from his contract of enlistment by a discharge, but has no power to suspend it, even with the soldier's consent.

DEPARTMENT OF JUSTICE,
September 4, 1877.

SIR: In answer to your letter of the 2d instant, in regard to a claim of Henry F. Lines, late of Company B, First Illinois Artillery, for compensation as a telegraph operator, and requesting an opinion, at the instance of the Second Comptroller, as to whether this claim can legally be allowed, I have the honor to say:

Lines was a soldier in the service of the United States as a private of the First Illinois Artillery, and while in such service was detailed for duty as a telegraph operator. By the statute approved March 3, 1863, it is provided (sec. 35) that "enlisted men, now or hereafter detailed to special service, shall not receive any extra pay for such services beyond that allowed to other enlisted men." This section repeals the authority to allow extra-duty pay to soldiers detailed for special service, and such, I think, is clearly the legislative construction of it, as shown by the act of April 1, 1864, in which provision is made for payment of extra compensation to a particular class of soldiers.

The suggestion is made that the case of Lines may be taken out of the general rule, upon the ground that he was

Soldiers Detailed for Special Service.

allowed a furlough without pay or emoluments by virtue of an order of the Secretary of War of the date of November 19, 1864, and that a portion of the service for which he seeks extra compensation was rendered after the issuance of such order.

At the time the said order issued, Lines was already upon duty as a telegraph operator by virtue of an order of May 3, 1864, proceeding from the headquarters of the Army of the Tennessee, and continued upon this duty after the issuance of the furlough in question. It will be observed that the order issued November 19, 1864, giving him a furlough without pay or emoluments, contains also an order that the soldiers therein named "will be borne on their company rolls as on furlough without pay or emoluments, and will report for duty by telegraph to Capt. J. C. Van Duzer, assistant quartermaster, United States Volunteers, Nashville, Tenn." The duty to be performed was in the United States Telegraph Corps. All parts of this order, as well as those of the previous order, are to be taken together, and it cannot be considered to be a furlough in any proper sense of the term. That is not a furlough which does not release the soldier temporarily from his military service, but simply transfers him from one branch of the service to another and from one duty to another. This order relieves Lines from duty in his company, but orders him for duty to another military commander. It is in all essential characteristics a detail of him to the performance of the duty which he afterwards discharged. It is not possible, although it is called a furlough, when it is accompanied by a detail for other and distinct duty, to treat it otherwise than as a detail for such duty. It will be observed that in the letter of the Secretary the order is so treated.

It has also been suggested that this order may be treated as a suspension of the soldier for the time being, and that he may thus receive pay suitable to the important duty which he performed as a telegraph operator.

It is impossible to give the order this construction, for it is not in the power of the Secretary to suspend the enlistment of a soldier, retaining the right to resume his proper control over him as an enlisted man at any definite or indefinite period. He may discharge him from the service accord-

Claim of George H. Giddings.

ing to the contract which is made by enlistment, but the right to suspend the contract does not exist upon the part of the Secretary, even with the consent of the soldier. To use the language of Attorney-General Clifford (4 Opin., 538): "The Executive Department has discretionary authority to discharge before the term of service has expired, but has no power to vary the contract of enlistment."

I am therefore of opinion that no contract to pay a monthly salary to an enlisted man as a telegraph operator could legally be made. The soldier is entitled to receive the amount of his pay and emoluments as a private, and no more.

Considering the value of the services rendered by Private Lines, I should be very glad in his individual case, if it were in my power, to come to a conclusion different from that which I have stated.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,

Secretary of War.

CLAIM OF GEORGE H. GIDDINGS.

In February, 1861, and previously, G. had a contract (with the usual provision for one month's pay where service is discontinued) for carrying the mail on route 8076 from San Antonio to Los Angeles, via El Paso, which was by an order of the Postmaster-General issued on the 16th of March, 1861, in pursuance of the act of February 27, 1861, chap. 57, extended until June, 1865. Subsequently, on the 30th of May, 1861, the Postmaster-General issued an order (under the act of February 28, 1861, chap. 61) discontinuing the service between San Antonio and El Paso until it could be safely restored. In 1863 the Post-Office Department declined to make an allowance for discontinuance of service on this part of the route, for the reason that it "stands in the same category with the mass of Southern mail contracts, and must await whatever action is taken on them." Held (1) that this was not a final adjudication upon the claim for one month's pay for said discontinuance, but amounted only to a postponement of its consideration, and that the Department is not precluded thereby from now passing upon the claim; (2) that though the action of the Postmaster-General in discontinuing the service was taken under the act of February 28, 1861, the contractor is nevertheless entitled to the one month's pay by virtue of his contract, agreeably to the law as laid down in the case of *Reeside vs. United States*, (8 Wall., 38.)

Claim of George H. Giddings.

DEPARTMENT OF JUSTICE,

September 5, 1877.

SIR: The questions proposed by you in relation to the claim of George H. Giddings arise, as I understand from your several communications, upon the following state of facts:

In February, 1861, and previously, Giddings had a contract for carrying the mail on route 8076, from San Antonio to Los Angeles, via El Paso, for which he was to receive per annum \$175,000 for that part of the route between San Antonio and El Paso, and \$125,000 for that part of the route between El Paso and Los Angeles—\$300,000 in all.

The contract for service on this route contained the provision required by law that the Postmaster-General might discontinue or curtail the service in whole or in part whenever the public interests should require it, he allowing one month's pay on the amount of service dispensed with.

On February 22, 1861, the ordinance of secession of the State of Texas was passed. On February 28, 1861, Congress passed an act providing that whenever, in the opinion of the Postmaster-General, the postal service cannot be safely continued * * * on any post-routes by reason of any cause whatever, the Postmaster-General is hereby authorized to discontinue the postal service on such routes, or parts thereof, * * * till the same can be safely restored. (12 Stat., 177.)

On July 13, 1861, Congress authorized the President to declare, by proclamation, any one of the several States, or parts thereof, named in said act (which included the State of Texas), to be in insurrection against the United States, and enacted that thereupon all intercourse should cease between the citizens thereof and the citizens of the rest of the United States. (12 Stat., sec. 5 of chap. 3, p. 257.) In pursuance thereof the President, on the 16th day of August following, declared Texas, with other States, in insurrection. (12 Stat., 1262.)

On February 27, 1861 (12 Stat., sec. 16, p. 169), Congress passed an act directing the Postmaster-General to extend mail contract on route 8076, the route covered by Giddings's

Claim of George H. Giddings.

contract, so that it would expire with connecting route in 1865, and increased the pay. On March 16, 1861, the Postmaster-General, under the act of Congress of February 27, 1861, issued an order extending contract of Giddings until June, 1865:

On the 30th of May, 1861, an order was issued by the Postmaster-General, to take effect on the 1st of July following, to discontinue the service between San Antonio and El Paso, a distance of 700 miles, until it can be safely restored.

Service on said route from El Paso to Los Angeles was continued until August 2, 1861, on which date the following order was issued:

“**TEXAS.—San Antonio to San Diego, 1,520 miles. Route 8076, 1859-'62.**

“Discontinue service and annul the contract, to take effect immediately.”

On October 23, 1861, the postmaster at San Diego, California, reported that the order of August 2, 1861, went into effect on the 11th of September, 1861.

The records and papers on file further show:

“**APRIL 21, 1862.—Withdraw certificate of the postmaster at San Diego, California, reported October 23, 1861, and fix date of discontinuance of service under order of August 2, 1861, to take effect on the 30th of September, 1861, instead of the 11th of September, 1861.**”

Records further show payment for service from San Antonio to El Paso up to time of suspension of the order of May 30, 1861, but no record appears of any payment of extra pay for one month on this end of the line.

Mr. M. B. Bramhall was financial agent of Giddings, and in April, 1862, he gave an order to John T. Doyle for the month's extra pay on the entire line of the route from San Antonio to Los Angeles and San Diego.

In January, 1863, it is shown by the papers on file that the Department held that the claimant was entitled to one month's pay on the western portion of the route, and it is stated in the application made by Doyle for reconsideration that this language was used by G. W. McLellan, then Assistant Postmaster-General, in his decision, namely: “2. That

Claim of George H. Giddings.

the eastern half of it which was suspended by the order of May 30, 1861, stands in the same category with the mass of Southern mail contracts, and must await whatever action is taken on them," and that Doyle refused to accept one month's extra pay on that portion of the route.

On September 27, 1866, Mr. Bramhall, the financial agent again made application for one month's extra pay on the entire route, but no record appears showing that any disposition was made of the application.

On the 14th of February, 1866, Giddings applied for the restoration of the service on that part of the route between San Antonio and El Paso, and no record is shown of the disposition of this application.

On July 31, 1867, Agent Bramhall made application for one month's extra pay on the route from El Paso to Los Angeles, and it was allowed and paid for that end of the route under the following order :

"AUGUST 1, 1867.—Route 8076, Texas, 1,520 miles.—San Antonio to San Diego.

"Continue order of August 2, 1861, so as to allow contractor one month's extra pay on discontinuance of service and annulment of contract."

Upon this state of facts the first question that arises is, whether or not it has been definitely decided and adjudged by the Department that the month's pay on that portion of the route now claimed, to wit, from San Antonio to El Paso, is to be treated as having been finally settled and determined.

The rule that matters once fully considered and decided by a Department are not to be reopened and readjudicated by its successors, unless upon the occurrence of new facts, or upon such a change of the law as would justify a review in an action at law or a bill in equity, is so well settled that it may now be assumed.

From this state of facts it appears that the first adjudication was by Assistant Postmaster-General McLellan—that the eastern half of the route suspended by the order of May 30, 1861, stands in the same category with the mass of Southern mail contracts, and must await whatever action is taken on

Claim of George H. Giddings.

them. This adjudication amounts only to a postponement of this claim; while the claim for one month's pay on the western portion of the route was allowed. This was in January, 1863. On the 27th of September, 1866, application was made for extra pay on the entire route; but nothing appears showing that any disposition was made of the application. On July 31, 1867, Agent Bramhall made application for one month's extra pay on the western portion of the route, to wit, from El Paso to Los Angeles, and it was allowed and paid.

It appears, therefore, that in this application he included no claim for the eastern end of the route, and his previous application of September 27, 1866, seems to have slumbered.

I am therefore of opinion, upon this state of facts, that it cannot be said that the matter of the present claim for one month's pay upon the eastern portion of the route has been finally adjudicated by the Department, and I do not think that the taking of the one month's pay which was allowed upon the western end of the route can fairly be interpreted as any waiver of the claim upon the eastern end of the route, the only formal adjudication upon which appears to have been that it should await whatever action was taken with the mass of Southern mail contracts.

Considering the question as one which the Department may treat as fairly before it, and in which their action cannot be deemed to have been controlled by a previous adjudication, it is necessary to examine the validity of this claim.

That seems to me to be settled by the case of Reeside against The United States, (8 Wall., 38,) in which it was held that the act of February 28, 1861, could not control the legal import of the contracts, nor did it confer any greater power than the Postmaster-General possessed under them, and that a discontinuance of the postal service upon a route in certain rebellious States would entitle the contractor to one month's pay for services upon the route or such portion thereof as was thus discontinued. (See also 7 C. Cl., 89.) The facts in the present case, although they differ in some details from those in the case of Reeside, do not differ in any particulars essential to the decision.

Rebate on Articles for Repair of Vessels.

In making this reply, I have not considered the question whether there is now any appropriation from which the claim, if allowed, could be paid by the Postmaster-General.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

REBATE ON ARTICLES FOR REPAIR OF VESSELS.

An American vessel employed in the foreign trade, for the repair of which articles of foreign production have been withdrawn from bonded warehouse free of duty, may engage in the coastwise trade not more than two months in any one year without payment of duties on such articles Section 2514 Rev. Stat. is to be construed with section 2513 Rev. Stat., as if it formed a part thereof.

DEPARTMENT OF JUSTICE,
September 5, 1877.

SIR: Your letter of the 24th ultimo proposes the inquiry, "Whether, under the tenth section of the act of June 6, 1872, (reproduced in the Revised Statutes, sections 2513 and 2514,) an American vessel, for the repair of which articles of foreign production have been withdrawn from bonded warehouse free of duty, may be employed, without the payment of duties on such articles, in the coastwise trade of the United States, not more than two months in any one year, in the same manner as vessels in the construction of which such articles have been used?"

In reply, I have the honor to say that, in my opinion, the second proviso in the tenth section referred to is intended to apply to the same class of vessels which are described in the section itself—that although the words "engaged exclusively in foreign trade" are used in such proviso, this must be taken in connection with the description of vessels which is given in the substance of the section, (and that is a vessel employed in foreign trade,) which vessels are prohibited from receiving the benefit of the section if they engage in the coastwise trade of the United States more than two months in any one year.

The object of the section appears to be clear in regard to

Rebate on Articles for Repair of Vessels.

the coastwise trade. Conducted entirely by American-built vessels, there is no competition, therefore, between such vessels, in regard to this trade, and foreign vessels. In regard, however, to vessels engaged in foreign trade, there is necessarily a competition between them and foreign-built vessels; and the object of the statute was to enable vessels built for the foreign trade to be built more cheaply by relieving them of certain duties upon articles necessarily employed in their construction, and the same principle would apply to articles employed in their repair. The reason for permitting vessels engaged in foreign trade to be engaged for two months in the year in the coastwise trade is also apparent. In conducting every foreign trade, it would be necessary for our American vessels to go from port to port in order to obtain at the particular port from which they were chartered for foreign voyages, or where they expected to obtain foreign voyages, their freights. In thus proceeding from port to port along our coast, it would be a heavy addition to their expenditure unless they were permitted to take such coastwise cargoes as were offered; and the case upon which your question arises itself furnishes an illustration of this remark. The vessel in question having a charter to go a foreign voyage from Charleston, S. C., and being at Belfast, Me., could undoubtedly pay a portion of her expenses in proceeding from Belfast to Charleston under a coastwise clearance, taking a cargo to be delivered at Charleston.

As the same reasons apply in the case of repair of vessels that apply to their construction, and as the proviso in question is included in the same section, although the proviso in regard to the repair of vessels uses, as before stated, the words "engaged exclusively in foreign trade," it is not to be interpreted as requiring an exact accordance with that which its terms would require if it stood alone. It is to be construed as applying to those vessels which are engaged in foreign trade, and which do no coastwise business except such as is purely incidental to the conducting of their foreign trade, namely, that of proceeding from port to port along our coast in order to reach the point from which they are to conduct their foreign trade.

No change is made in this section by the Revised Statutes,

Case of the Eagle and Phoenix Manufacturing Company.

in which it is divided into two sections. Section 2514 is still to be construed as if it formed a part of section 2513.

I am therefore of opinion that the vessel in question, being a vessel engaged in foreign trade, and having been employed in the coastwise trade for less than two months, is entitled to a rebate of duties upon the articles which were used in her repair.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

CASE OF THE EAGLE AND PHOENIX MANUFACTURING COMPANY.

The Eagle and Phoenix Manufacturing Company, a Georgia corporation, with a large capital invested in mills, machinery, &c., by authority of an act of the Georgia legislature passed in 1873 established a savings bank in connection with its manufacturing business, pledging the entire capital stock and property of the company for the payment of depositors and the holders of certificates of deposits issued thereby. By the same act the company was authorized to issue certificates of deposit "to an amount equal to the amount actually deposited, in sums of five, two, and one dollars, which may be payable to the holder of the same, and may be circulated by delivery as currency," which were issued and employed as currency in the business of the company: *Held* that the company is subject to the tax imposed by the second paragraph of section 3408 Rev. Stat., of "one-twenty-fourth of one per centum each month" upon its whole capital stock.

DEPARTMENT OF JUSTICE,
October 3, 1877.

SIR: Your letter of the 15th ultimo, relative to the liability of the Eagle and Phoenix Manufacturing Company to taxation as bankers under the second item of section 3408 of the Revised Statutes, should be considered in connection with that statute and the statute under which the company is doing business.

In March, 1866, this company was incorporated to carry on the manufacture of cotton and woolen goods at Columbus, Ga., for which purpose a capital of \$1,250,000 was invested in mills, machinery, &c.

Case of the Eagle and Phoenix Manufacturing Company.

By an act approved February 17, 1873, the legislature of Georgia authorized the company "to establish a savings department in connection with the business of said company, and to receive money on deposit from the employés of said company, and others, and pay such rate of interest (not exceeding ten per cent.) upon the same as the directors of said company may determine.

"*SECTION 2. Be it further enacted, by the authority aforesaid,* That the said company is authorized and is hereby required to pledge the entire capital stock and property of said company for the payment of depositors and those holding certificates of deposit in said savings department. And each stockholder in said company shall be individually liable for the ultimate payment of depositors and those holding certificates of deposit in said savings department in proportion to the amount of his stock.

"*SECTION 3. Be it further enacted,* That, after the capital stock and property shall have been so pledged, the said company may issue certificates of deposit to an amount equal to the amount actually deposited, in sums of five, two, and one dollars, which may be payable to the holder of the same, and may be circulated by delivery as currency."

The fourth section empowers the directors to make the necessary by-laws and regulations for the proper management of the savings department.

In the exercise of this power the rate of interest was fixed at 7 per cent. per annum, "credited to each account on the 1st day of January, April, July, and October. Thus interest will be payable or compounded four times annually," &c. The fourth by-law required the presentation of pass-books whenever deposits were made or, wholly or in part, withdrawn, while the fifth regulation declared that a payment in good faith "to persons producing the depositor's pass-book shall be good and valid," &c. The ninth by-law states that such a pass-book, containing the rules and regulations, will be given every depositor when the first deposit is made; and "the receiving of this book shall be considered by both the company and depositor as an assent to be governed by the rules as the terms of agreement." The sixth rule is as follows: "6. By the authority of its charter, this department

Case of the Eagle and Phoenix Manufacturing Company.

claims the right to issue certificates of deposit equal to the amount actually deposited." The company not only claimed this right, but exercised it by issuing certificates of this tenor, viz:

"Certificate of Deposit, No. —.

(Paid-up capital, \$1,250,000.)

"Savings department, Eagle and Phenix Manufacturing
"Company of Columbus, Ga.

"This certifies that one dollar" [or two dollars, or five, as the case may be] "has been deposited in the savings department, and that said amount will be paid in currency, to bearer, on return of this certificate,

March 1, 1875.

*"A. J. BUSSEY,
"President.*

*"G. G. JORDAN,
"Secretary and Treasurer."*

Every such certificate bore upon its back this indorsement: "Authorized by an act of the general assembly of the State of Georgia, upon the special condition 'That the entire property of the Eagle and Phenix Manufacturing Company, and of the stockholders individually in proportion to their shares, is pledged for the payment of depositors and those holding certificates of deposit in said savings department,' such act being approved 17th February, 1873, by James Milton Smith, governor of Georgia."

It will be hereafter noticed that, though this indorsement states sufficiently for its purpose, perhaps, the liability of the stockholders, it does not do so with entire accuracy.

From the tenor of the by-laws and certificates, as well as from the returns of deposits and circulation made by the company to the internal-revenue officers, it is apparent that these certificates were issued to persons other than those making the deposit, who received the pass-book before mentioned as the evidence of such deposit. Authority for this issue of certificates was found under the provisions of the act of February 17, 1873, especially under the third section thereof, which, by only requiring that the amount issued shall not exceed that actually deposited, and by fixing the denom-

Case of the Eagle and Phoenix Manufacturing Company.

inations at the specific sums of one, two, and five dollars, was construed to intend such an issue of these certificates. These, it is to be fairly inferred, were used for the ordinary purchases and disbursements of the company in its business as a manufacturing corporation or in discounts. As observed in the opinion given on the 7th of April last, at your request, relative to this same provision of law, (Rev. Stat. sec. 3408, item second,) the imposition referred to therein is a charge for the exercise of a privilege, and not an assessment upon the valuation of property. It is not affected by the fact that a further use is made of the property beside its use as a basis for banking.

The original depositor, or the assignee of his book and claim, was promised repayment of his deposit, with interest at 7 per cent. compounded quarterly. Of this promise the pass-book was the evidence. For every dollar of this indebtedness the company was authorized to issue another obligation in the form of a certificate of deposit. Its debts were thus used as the measure, if not the foundation, of its banking capacity. Of course it received some equivalent in money, or cotton, or some other commodity required in its business, for these certificates; yet their issue and their employment and circulation "as currency" was a very valuable privilege —one which would not have been granted except upon the pledge of all the capital of the corporation in whose business they were used for the redemption of these certificates. Thus the whole capital stock was the basis of the business of banking as well as that of manufacturing.

It is suggested by the officers of the Eagle and Phoenix Manufacturing Company, by way of *reductio ad absurdum*, that if their whole capital is liable to be taxed as engaged in the business of banking, the property of the individual stockholders is also equally so subject, because it, too, is pledged to secure the redemption of these certificates. Two observations, I apprehend, will completely answer this objection. First, the capital and property of the corporation are, by the charter, made primarily and directly responsible for the payment of these certificates, because directly used in connection with their issue and in the conduct of the business; while the property of the stockholders is only made contingently and

Suspension of Officers—Vacancies—Nominations.

“ultimately” subject to respond to these claims, because it is only indirectly benefited by, or concerned in, any of the corporate business of the company. Secondly, the statute which imposes the tax (Rev. Stat., sec. 3408, item second) itself fixes “the capital of any bank, association, company, [or] corporation,” and not the property of the corporators, as the measure of the assessment. It might be easily shown that the Eagle and Phœnix Manufacturing Company, with its savings department, conducted as herein stated, is a banking association and corporation; but this is unnecessary, because it is not questioned, but conceded by the company. As just noticed, it is the chartered “capital” of such corporations that is liable to and the measure of an assessment under the section we are considering; while it is only in the case of a “person in the business of banking,” where there is no fixed capital, but the amount thus engaged is fluctuating, that the “capital employed” is made the basis of the assessment. Therefore, if this company does a banking business, its whole capital is assessable, whether employed to its full extent in this business or not.

If it were essential to the imposition to show that only capital employed was subjected thereto, it would not be difficult in this case, where the whole capital constitutes the basis upon which the certificates are issued and is liable for their redemption.

The papers by you transmitted are herewith returned as requested.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

SUSPENSION OF OFFICERS—VACANCIES—NOMINATIONS.

Power of the President respecting the suspension of civil officers appointed with the consent of the Senate, and his duty in regard to the nomination of persons in the place of suspended officers, and also in regard to the filling of vacancies in civil offices happening during a recess of the Senate, under the provisions of sections 1768 and 1769 Rev. Stat., stated. No duty is devolved upon the President to send in nominations to the Senate in place of suspended officers, or to fill vacancies, unless that body shall continue in session for thirty days.

Suspension of Officers—Vacancies—Nominations.

Where no nomination in place of a suspended officer has been sent in, and the Senate adjourns, or, a nomination having been sent in, the Senate adjourns without confirming it, the officer suspended thereupon becomes reinstated, but he may be again suspended by the President, as before. In the case of a *vacant office*, under like circumstances, the office would be in abeyance upon the adjournment of the Senate.

The President, in nominating a person to the place of a suspended officer, need not give any reasons for the suspension.

DEPARTMENT OF JUSTICE,

October 4, 1877.

SIR: In connection with our conversation as to the duty of the President in sending in nominations to the Senate, and the effect of a failure so to do upon his part or upon that of the Senate to act favorably thereon, I submit the following as a brief abstract of the law in relation to this subject:

Suspended officers.—By section 1768 of the Revised Statutes, the President is authorized during any recess of the Senate to *suspend* any civil officer appointed with the consent of that body (except judges of United States courts) *until the end of the next session of the Senate*, and to designate some suitable person to *perform the duties* of the suspended officer *in the meantime*.

At such next session, and *within thirty days* after the commencement thereof, the President is, by the same section, required to nominate a person in the place of the suspended officer.

Should the Senate, during such session, refuse to consent to the appointment of the person so nominated, the President is required, as soon as practicable, to nominate another person for the office to the *same session*.

If the session should not continue thirty days, and, previous to its expiration, the President may have nominated no one to the Senate in place of the suspended officer, the result would be that immediately upon the termination of the session the authority of the person designated to perform the duties of the suspended officer would cease, and the latter become reinstated, for in such case the office is not put in abeyance. The incumbent, however, may be again suspended by the President, as before. And the result would be the same when the President has nominated some one to the Senate in place of the suspended officer, but that body adjourns

Suspension of Officers—Vacancies—Nominations.

without acting upon the nomination, or after refusing its assent to the appointment. (See 13 Opin., 301.)

Vacancies.—By section 1769 of the Revised Statutes, the President is authorized to fill all vacancies which may happen during the recess of the Senate, by reason of death, or resignation, or expiration of term, by granting commissions which shall expire at the end of the *next session of the Senate*. Within thirty days after the commencement of the session, the President is, by section 1768 of the Revised Statutes, required to nominate persons to fill all vacancies in office (excepting vacancies in offices which, in his opinion, ought not to be filled) that existed at the meeting of the Senate, whether temporarily filled or not.

If during such next session no appointment, with the consent of the Senate, should be made for the vacancy, (whether it at the time be temporarily filled or not,) in that case the office is to remain in abeyance until it is filled by appointment with the consent of the Senate.

Accordingly, if the session of the Senate should not last thirty days, and before its expiration no nomination to fill the vacancy may have been sent in by the President, the vacant office (whether temporarily filled or not) would be in abeyance immediately upon the termination of the session, and would so remain until, at a future session, the Senate should consent to an appointment thereto.

It will be seen that an office, the incumbent of which is merely *suspended*, is in no case placed in abeyance. This condition arises only where the office is *vacant*.

There is no duty devolved upon the President to send in nominations to the Senate in place of officers suspended or to fill vacancies unless that body shall continue in session for thirty days, although the results above stated follow if the Senate adjourns without confirming those appointed to take the place of suspended officers or to fill vacancies.

In sending in nominations to take the place of officers suspended by the President, it is not necessary that any reasons for such suspension should be stated.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

Privileged Communications.

PRIVILEGED COMMUNICATIONS.

Official correspondence between the Commissioner of Internal Revenue and a district attorney, in relation to cases of violation of the internal-revenue laws and to prosecutions thereunder, belong to that class of communications which, on grounds of public policy, are regarded as privileged, and the production of which in evidence, in a suit between private parties, the law will not enforce.

A *subpoena duces tecum*, issued by a State court, was served upon a district attorney, requiring him to appear as a witness in a private suit and bring with him all letters and telegrams received from the Commissioner of Internal Revenue relative to certain causes then pending in a United States court on indictments under the internal-revenue laws: Advised that it would be proper for the attorney to appear before the State court in obedience to the writ, and there object to produce the papers on the ground that they are privileged, if, in his judgment or in that of the Commissioner, their production would be prejudicial to the public interests.

DEPARTMENT OF JUSTICE,

October 12, 1877.

SIR: I have had under consideration the letters of the United States attorney for the southern district of Illinois and of the Commissioner of Internal Revenue, which accompanied your communication to me of the 29th ultimo, "relative to the propriety of producing certain official papers in compliance with a *subpoena duces tecum* from the circuit court of Randolph County, Illinois."

It appears by the letter of the first-mentioned officer that a *subpoena duces tecum* issued by said court has been served upon him to appear as a witness in a suit pending therein between private parties, and to bring with him all letters and telegrams received from the Commissioner of Internal Revenue in relation to the causes of the United States against certain persons who had been indicted in the United States district court for the southern district of Illinois for violation of the internal-revenue laws. The plaintiff in the suit, at whose instance the writ was issued, is seeking to recover compensation for his services as an attorney for the defendant, and wants to use the letters and telegrams referred to as evidence tending to establish the fact that he performed services in that capacity.

Privileged Communications.

These papers the United States attorney declines to produce, on the ground that they are privileged communications; but he expresses a desire not to provoke a conflict upon doubtful ground, and asks that the subject be submitted to the Attorney General for his views touching the point indicated. It is upon this point, I understand, that you request my opinion.

Official correspondence between the Commissioner of Internal Revenue and the district attorney, in relation to cases of violation of the internal-revenue laws, and especially to prosecutions thereunder, must, I think, be deemed to belong to that class of communications which, on considerations of public policy, are regarded as privileged; that is to say, they are official communications, whose production in evidence, in a controversy between individuals, the law will not enforce. It is obvious that, from the nature of the subjects with which they deal, they may often contain matter of a confidential character, the disclosure of which might frustrate the ends sought to be accomplished (as respects the particular cases to which they relate) in the administration of the revenue laws, and thus prove detrimental to the public interests. Their exemption from being made instruments of evidence, in a suit between private parties, rests upon the principle that where the production of an official paper would be injurious to those interests, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice. Upon this principle it has been held that official communications between the governor and law officer of a colony respecting the state of the colony, (*Wyatt vs. Gore*, Holt's N. P. C., 299,) orders given by the governor of a colony to a military officer, (*Cooke vs. Maricell*, 2 Stark. R., 183,) a correspondence between an agent of government and a secretary of state, (*Anderson vs. Hamilton*, 2 B. & B., 156, n.) the report of a military court of inquiry respecting an officer whose conduct the court had been appointed to examine, (*Horne vs. Bentnick*, 2 B. & B., 130,) the official correspondence between the commissioners and an officer of the customs, (*Black vs. Holmes*, 1 Fox & Smith, 28,) a letter from a secretary of state to a person acting under his authority, (case cited 2 Stark. R., 185,) and a report made by an

Reinstatement of Suspended Officers.

inspector-general of prisons to the lord-lieutenant of Ireland, (*McErveny vs. Connellan*, 17 Irish Com. Law Rep., 55,) are privileged communications, which courts of justice will not enforce the production of. I am not able to cite any adjudged cases from our American reports in which the rule exempting official papers from being used in evidence has been applied, but I find it laid down in American treatises of authority on the law of evidence as one which is well established and which governs the courts in this country; and the English decisions to which I have referred as illustrative of the rule and its application are cited in those treatises with apparent approval. (See 1 Greenleaf on Evidence, sec. 251; 1 Whart. on Evidence, sec. 604.)

While I entertain no doubt that the letters and telegrams which passed between the Commissioner of Internal Revenue and the United States attorney, regard being had to their subject-matter, fairly come under the protection of the principle above adverted to, it seems to me that it would be proper for the latter officer to appear before the court in obedience to the subpoena, and to there object to produce the papers called for on the ground that their production would be prejudicial to the public interests, if, in his judgment or in that of the Commissioner, such would be the case. It may reasonably be presumed that the court, on the objection being made, will be governed by the prevailing rule of law, according to which the production of the papers would seem not to be compellable.

I herewith return the letters mentioned, which were received with your communication.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

REINSTATEMENT OF SUSPENDED OFFICERS.

Where an officer has been suspended during a recess of the Senate and another person designated to perform his duties, under section 176 Rev. Stat., the President may at any time revoke the suspension and thus reinstate the officer.

Reinstatement of Suspended Officers.

DEPARTMENT OF JUSTICE,

October 13, 1877.

SIR: Referring to our conversation of this morning, the inquiry was made whether, in a case where a collector of customs had been suspended and his deputy appointed in his place, the suspension could be withdrawn and the original collector thus reinstated.

The statute prescribes (Rev. Stat., sec. 1768) that "during any recess of the Senate the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed, in his discretion, by the designation of another, to perform the duties of such suspended officers in the meantime." * * *

Under this statute, it would appear that in case it was deemed advisable by the President to remove the officer who had been appointed in place of the suspended officer and to appoint another in place of such officer, he would be authorized so to do by the terms of the statute. The character of the act of suspension is such that it would also seem to be clear that in case the President should deem it his duty to withdraw the suspension which he had ordered he might do so, and thus reinstate the original officer. The word "suspension" itself imports that the person suspended is still the incumbent of the office—that the interruption in the performance of its duties by him is temporary only. If, therefore, before another person had been actually nominated to the Senate, the President should come to the conclusion that the suspension had been inconsiderately made, or that the reason for making it had ceased to exist, he would be entitled to revoke it. The effect of such revocation would be to restore the original incumbent, who had been confirmed in his office by the Senate, to his original position.

It was held by Attorney-General Hoar (13 Opin., 221) that consistently with the spirit and purpose of the tenure-of-office acts of March 2, 1867, and April 5, 1869, the President might revoke the suspension of an officer, and reinstate him in the

Case of the Continental Bank-Note Company.

functions of his office, after the refusal by the Senate to concur in the nomination to fill his place. In that case, the Senate having refused to concur in the nomination made by the Executive to fill the place of the suspended officer, and being still in session, it was held that the act of revoking the suspension might be made by the Executive, and that its effect would be to restore to his former condition the actual incumbent of the office, to whose removal the Senate had given no advice or consent. If this power might properly be exercised after the Senate had rejected the nominee in place of the suspended officer, no reason is perceived why the same power might not properly be exercised by the Executive previous to making any nomination to the Senate.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

CASE OF THE CONTINENTAL BANK-NOTE COMPANY.

The Continental Bank-Note Company of New York contracted to furnish and deliver to the Post-Office Department for the term of four years, commencing May 1, 1873, all the adhesive postage stamps which might be required by the Department, and agreed to keep on hand at all times a stock of stamps sufficient to meet all orders of the Department. For the stamps delivered in pursuance of the agreement the company were to be paid at a certain rate per thousand, which was to be "full compensation for everything required to be done or furnished" under the contract. On the 24th of April, 1877, just before the contract expired, a new agreement was made with same company, to commence on May 1, 1877, by which the stamps were to be furnished at a lower rate. At the expiration of the first contract a surplus stock of stamps remained on the company's hands, which were delivered in fulfillment of orders under the second contract, and for which the company claims an allowance at the rate fixed in the first contract: *Held* that the claim is inadmissible, and that the company should only be paid therefor according to the rate fixed in the second contract.

DEPARTMENT OF JUSTICE,

October 24, 1877.

SIR: I have the honor to reply to your letter of August 28 last, transmitting certain contracts and other papers relating to the claim of the Continental Bank-Note Company of New

Case of the Continental Bank-Note Company.

Yofk, and asking what action, if any, should be taken by your Department touching the premises.

I have carefully examined the case, and will state as briefly as possible the conclusions to which I have arrived.

In January, 1873, the Post-Office Department entered into a written contract for the manufacture and supply of adhesive postage stamps of the various denominations required, to commence May 1, 1873, and to continue four years from that date. Those stipulations that have any material bearing on the present inquiry are as follows:

"1st. To furnish and deliver all the adhesive postage stamps which may be required by the Post-Office Department for a term of four (4) years, commencing on the first day of May, one thousand eight hundred and seventy-three (1873).

"3d. To keep on hand at all times a stock of the several denominations of stamps, subject to the control of the agent of the Department, in all stages of manufacture, sufficient to meet all orders of the Department, and to provide against any and all contingencies that may be likely to occur during the existence of the contract, so that each and every order of the Department may be promptly filled, and the Department shall have the right to require the party of the second part, at any time during the existence of the contract, to furnish an extra quantity of stamps not exceeding a supply for three months.

"9th. To report to the Department weekly, under oath, the number of stamps manufactured, (finished, unfinished, and spoiled,) the number issued during the week, and the number available for issue, all spoiled stamps to be counted and destroyed in the presence of an agent of the Department and a representative of the party of the second part.

"10th. To furnish the agent of the Department and his clerks suitable office and desk room at the place of manufacture for the transaction of the business of his agency, without cost to the United States, and to conform in all respects to such regulations as the Department or its agent may from time to time adopt for the security of the Government.

"And the said party of the first part agrees to pay the said party of the second part for the stamps delivered in pursuance of this agreement at the rate of fourteen cents and

Case of the Continental Bank-Note Company.

ninety-nine one-hundredths of a cent ($14\frac{9}{100}$) for each one thousand (1,000) stamps, which shall be full compensation for everything required to be done or furnished under this contract; payments to be made quarterly, &c.

"It is further mutually agreed by and between the contracting parties as follows:

"1st. That an agent of the Department shall have supervision of the manufacture, storage, and issue of the stamps, who shall at all times have full and free access to the apartments, safes, and vaults where the stamps are manufactured and stored for the purpose of inspecting the same, and whose duty it will be to require the stipulations of the contract to be faithfully observed."

On the 24th of April, 1877, just before the expiration of the contract, the Post-Office Department entered into a new contract with the same company, to commence on the first of May following, in which new contract the average price specified for the stamps is lower than in the former.

It is contended by the company that a faithful performance of their contract would necessarily have resulted in a surplus stock of stamps being left on hand at its termination; that, in point of fact, a surplus stock was so left, and although it has been used under their succeeding contract with the Government, (which stipulates a less price than the former,) yet that they are entitled now to receive the difference between the existing contract price and that of the contract under which the stamps were prepared; that unless the Government had taken and used them under the succeeding contract they would necessarily have been destroyed, and that they must be treated as stamps prepared under the first contract, for which they are entitled to full payment.

It is difficult to understand why the same argument should not require that the United States should not only pay for the finished stamps which had been completely prepared under the contract, but also for the unfinished stamps which were then on hand and in course of preparation. It is not shown that the faithful performance of the contract would necessarily have resulted in the existence of any finished stamps at its close. The company was bound to keep on hand sufficient stamps "to meet all orders of the Department, and

Case of the Continental Bank-Note Company.

to provide against any and all contingencies that may be likely to occur during the existence of the contract, so that each and every order of the Department may be promptly filled." There was a provision that the contract might be extended by the Postmaster-General; but if, in the absence of the exercise of this authority, the contract should have terminated on the 30th of April, and on that day there were no stamps, finished or unfinished, under the terms of the contract, the company would not have violated it. While it is undoubtedly true that a compliance with the requirements of the contract would be likely, unless great care was exercised, to cause a stock to be left on hand at the expiration of the contract, such would not be a necessary result. Even should this be the case, it is not agreed, and it cannot be inferred, that such stamps were to be paid for by the Post Office Department. The contract was so framed, *ex industria*, as to guard against claims of this nature. It provided that, "for the stamps delivered in pursuance of this agreement," the rate of, &c., should be paid "for each one thousand stamps, which shall be full compensation for everything required to be done or furnished under this contract." If, in the performance of what was required to be done or furnished under the contract, stamps must necessarily have been left on hand at its close, the payment for the stamps delivered was all the compensation the company was to receive, as it was payment for everything which the company had done under the contract. The argument of the claimants is that as it cannot be presumed that any portion of the stock should be destroyed, it was therefore intended that the Government should pay for it. But when the Government in its contract expressly stipulates that, in paying for the stamps delivered to it, this shall be full compensation for everything required to be done or furnished on the part of the contractors, it cannot be inferred that the Government intends to pay for stamps which might be left on hand at the close of the contract.

The illustration used by Assistant Attorney-General Freeman in his opinion seems to me a very satisfactory one. If the now existing contract for the manufacture of stamps had been at a greater instead of a less price than the original contract, there is nothing in the contract to show that the Government could

Fees of District Attorneys, Marshals, and Clerks.

insist that the stock on hand at the close of the first contract should be delivered under the new contract and yet paid for under the old. The Government could not contend that inasmuch as the contract required that a stock should be kept on hand, and the stock kept on hand was at a lower price, it should have the benefit of it under a contract to pay a higher price. The reply that the only stock the contract required to be kept on hand was a sufficient amount "to meet all orders of the Department, and to provide against any and all contingencies that may be likely to occur during the existence of the contract, so that each and every order of the Department may be promptly filled," and that such having been done by the contractors under the first contract, the Government under its second contract could receive no other or greater benefit from the first contract, would have been conclusive. *Ex con-*
verso, when the Government contracts for stamps at a lower rate than that made by their first contract, the petitioners, in receiving pay for the stamps delivered under the first contract, have received pay for everything required to be done or furnished by them thereunder, and they cannot claim any additional price for the stock, finished or unfinished, at the close of the first contract, merely because they have made a second contract at a lower rate.

I am, therefore, of opinion that the petitioners have no just claim against the Department. In this view of the case I have not deemed it necessary to consider whether, even if the claim is well founded, there is any appropriation under which it could be paid.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,

Postmaster-General.

FEES OF DISTRICT ATTORNEYS, MARSHALS, AND CLERKS.

The fees of marshals, district attorneys, and clerks of United States courts, in Government suits, taxed and recovered as costs from the defendants therein, should be turned into the Treasury, and not paid over to the officers; they being entitled to payment (by force of section 856 Rev. Stat.) only on settling their accounts at the Treasury, and from the proper appropriation.

Fees of District Attorneys, Marshals, and Clerks.

So the fees of these officers, in cases of seizure, are not payable out of the proceeds of the property seized, except where the statute has so specially provided, but are payable only on settlement of their accounts at the Treasury, as in other cases. The exceptions to this rule are in cases of prize seizures, (section 4639 Rev. Stat.,) and seizures for forfeitures under the customs laws (section 3090 Rev. Stat.); also the per centum allowed to district attorneys in lieu of all costs and fees under section 825 Rev. Stat.

DEPARTMENT OF JUSTICE,
November 9, 1877.

SIR: By your letter of the 29th of August last, the following questions are, at the instance of the First Comptroller, submitted to me for an opinion thereon:

"1. Whether fees and expenses of marshals, district attorneys, and clerks of United States courts, in Government suits, when taxed and collected as costs, are payable to said officers, or payable into the Treasury pursuant to the provisions of sections 3216 and 3617 of the Revised Statutes.

"2. Whether such fees and expenses in cases of seizure, when not specially provided for by statute, are payable out of the proceeds of the property seized, when the same is condemned and sold as forfeited to the United States."

Section 856 of the Revised Statutes provides that "the fees of district attorneys, clerks, marshals, and commissioners, in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the Treasury." In Government suits the United States are liable to those officers for their fees where the service is rendered to the Government. (Compare *Caldicell vs. Jackson*, 7 Cranch, 276.) This liability arises when the service is performed; and hence the above provision applies as well where such fees are ultimately recovered as costs from the defendant, as where they are not so recovered. In either case they must, by force of that provision, (and especially when it is considered in connection with sections 3216 and 3617 Rev. Stat.,) be regarded as payable only on settlement of the officer's account at the Treasury.

But while this is to be deemed the general rule on the subject, there are exceptional cases, in which a different mode of paying such fees is required or authorized. Thus in prize cases, in the event of a condemnation and sale, they are

Case of the New Idria Mining Company.

directed to be paid from the proceeds of the sale. (See section 4639 Rev. Stat.) So in the case of fines, penalties, and forfeitures under the customs laws—the statute (sections 3090 Rev. Stat.) requiring only the proceeds thereof, after deducting “such charges and expenses” as are by law authorized to be deducted, &c., to be paid into the Treasury—it has been held that the officer’s fees are payable from the proceeds. (7 Benedict, 405.) So, in “any suit or proceeding arising under the *revenue laws*,” the per centum allowed to the district attorney in lieu of all costs and fees in the suit or proceeding (see section 825 Rev. Stat.) would seem to be payable out of the money thereby recovered. With these exceptions, the mode of paying the officer’s fees, in cases where the Government is liable therefor, appears to be regulated by section 856.

To the inquiries propounded by you, I have accordingly the honor to state in reply : First, that when the fees of the officers referred to are, in a Government suit, taxed and recovered as costs *from the defendant*, they should be turned into the Treasury and not paid to the officers, the latter being entitled to payment only on settling their accounts at the Treasury, from the proper appropriation. Second, that the fees of such officers are not payable out of the proceeds of property seized, except where the statute has so specially provided, as in cases of prize seizures and seizures for forfeitures under the customs laws.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

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CASE OF THE NEW IDRIA MINING COMPANY.

The Secretary of the Interior, by a decision dated August 4, 1871, rejected an application of the New Idria Mining Company, made under the act of July 25, 1866, chap. 262, for a patent of certain mineral lands in California. Subsequently the company filed an application for a rehearing, accompanied by affidavits obtained for the purpose of curing defects in the original application. The application for rehearing was denied by the Secretary April 27, 1872, but was reinstated by him June 15, 1872, since which time no action has been taken thereon. On March 3, 1875,

Case of the New Idria Mining Company.

Congress passed an act (chap. 130) requiring the Secretary of the Interior to furnish to that body at the beginning of its next session certain information respecting the lands in question, in compliance with which the Secretary made a report to Congress December 8, 1876; but thus far Congress has not acted further in the matter. In the meantime an ejectment suit, brought against the company by an adverse claimant of said lands, has been brought before the Supreme Court of the United States on a writ of error, and is still pending there. The company now ask that their case be taken up and reviewed upon the proofs originally made, the affidavits filed with the application for a rehearing, and the provisions of the act of May 10, 1872, chap. 152: *Held* (1) that the application for rehearing is fairly before the Department and can properly be considered; (2) that the action of Congress (in 1875) presents no obstacle to a determination of the matter of the application; (3) that the applicants are entitled to have their case adjudicated upon the law as it exists, and that, so far as any anticipated legislation is concerned, it is the duty of the Secretary of the Interior now to proceed with all reasonable expedition and determine the case: But *held*, further, that in view of the bearing which a decision in the case pending before the Supreme Court may have upon the matter, and also of other circumstances, the Secretary may, if he thinks justice requires it, properly delay his determination until that decision is rendered.

DEPARTMENT OF JUSTICE,

November 12, 1877.

SIR: I am informed by your letter of May 3 last of the following facts:

"There is now pending before this Department a motion for a review of the departmental decision of August 4, 1871; rejecting the application of the New Idria Mining Company, made under the provisions of the act of July 26, 1866, (14 Stat., 251-2,) for a patent of 480 acres of mineral lands situate in the State of California.

"This application, with accompanying papers, was received by the Commissioner of the General Land Office on the 12th day of August, 1868.

"September 17, 1870, the Commissioner decided that the applicant was entitled to a patent of the tract claimed, but owing to a letter received from the President, directing that his name should not be signed to a patent for said lands, he transmitted the application and accompanying papers, together with a copy of his decision, to the Secretary of the Interior.

"By the departmental decision aforesaid, made in accordance with the opinion of Assistant Attorney-General Smith"

Case of the New Idria Mining Company.

the decision of the Commissioner was reversed, and the application of the company rejected.

"A petition was then filed by the company for a rehearing, based upon affidavits filed in the case for the purpose of curing the defects in the application suggested by the opinion of Mr. Smith.

"This application was denied by departmental decision of April 27, 1872, but was subsequently reinstated by Secretary Delano, who, on June 15, 1872, directed that it should stand as if the latter decision had not been made.

"No proceedings have been had in the case since the latter date, and the company now ask that it be taken up and reviewed upon the proofs originally made, the affidavits filed in support of the motion for a rehearing, and the provisions of the mining act of May 10, 1872, so far as they are applicable to the case.

"The right of said company to a patent for the tract claimed has been vigorously contested from the beginning by William McGarrahan, who claims it by purchase from one Vicente Gomez, an alleged grantee of the Mexican Government.

"The grant to Gomez was finally rejected by the Supreme Court of the United States at its December term, 1865. (See 3 Wall., 752.)

"Prior to this decision by the Supreme Court, and on December 29, 1862, Caleb B. Smith, then Secretary of the Interior, directed the Commissioner of the General Land Office to issue a patent to Mr. McGarrahan for the tract in question.

"This decision was reaffirmed by J. P. Usher, Secretary of the Interior, March 4, 1863.

"March 12, 1863, Attorney-General Bates requested the Secretary of the Interior to forbid the issuing of a patent, stating that he desired to have the claimant's right to a patent determined by the Supreme Court.

"March 13, 1863, the Commissioner of the General Land Office was directed to suspend the execution and delivery of the patent until further advised by the Secretary.

"It is now claimed by Mr. McGarrahan that in pursuance of the orders of the Secretary of the Interior of December 29, 1862, and March 4, 1863, aforesaid, a patent for the tract

Case of the New Idria Mining Company.

in question was regularly executed March 14, 1863, although not delivered, under which he claims title to said tract.

"For the purpose of determining his right thereto under said alleged patent, he brought suit in ejectment against said New Idria Mining Company, which is now pending in the Supreme Court of the United States on writ of error from the decision of the supreme court of California.

"January 26, 1875, resolutions were passed by the House of Representatives of the United States requesting the Commissioner of the General Land Office to employ special counsel to commence proceedings in the name of the United States against the New Idria Mining Company in the circuit court of the United States for California to restrain the further waste of property, for the appointment of a receiver, the recovery of the possession of said premises, and also seven millions of dollars in gold alleged to have been illegally taken therefrom.

"Said resolutions also instructed and directed the Secretary of the Interior to withhold the issuing of any patent, and to allow no proceedings in his Department for the purpose of issuing patents, to the said New Idria Mining Company.

"The Secretary of the Interior and the Commissioner of the General Land Office, finding it impracticable and illegal to comply with the requirements of said resolutions, communicated their objections thereto to the President, by whom they were sustained, and the Secretary of the Interior was directed to transmit their objections to the House of Representatives with his approval.

"Under date of March 2, 1875, Secretary Delano transmitted a copy of his report to the President, together with the objections of the Commissioner of the General Land Office, to the Speaker of the House of Representatives.

"On the 3d of March, 1875, Congress passed an act which, among other provisions, contains the following: 'That the Secretary of the Interior be, and he is hereby, authorized and directed to cause a careful examination to be made for the purpose of ascertaining whether any person, firm, or corporation is now occupying any larger portion of the lands known as Rancho Panoche Grande than is authorized and allowed by the laws relating to mining lands, and that he

Case of the New Idria Mining Company.

make full report of such examination to Congress at the beginning of the next session; and, to enable the Secretary of the Interior to carry into effect this provision, the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated.' (18 Stat., 382.)

"In pursuance of the authority thus conferred, Richard P. Hammond, of San Francisco, Cal., was appointed by the Secretary of the Interior to make the required examination, with instructions, after such examination was completed, to make a full report thereof and transmit the same to this Department.

"A copy of Mr. Hammond's report, together with a map and accompanying papers, were transmitted by my predecessor, December 8, 1876, to the Hon. M. C. Kerr, Speaker of the House of Representatives, for the consideration of Congress, as required by the act aforesaid."

It does not appear that Congress has thus far taken action on said report.

In view of these facts, you submit for my opinion the inquiries, whether the said company is now entitled to have its application for a review of the departmental decision of August 4, 1871, considered and its rights under the provisions of the mining laws determined, or whether said application should be deferred until the suit above mentioned shall be finally determined, and until Congress shall have taken some action upon Mr. Hammond's report.

In answer to these inquiries, I have the honor to say, upon these facts, that the question whether the application of the New Idria Mining Company for a rehearing shall be granted is now fairly before the Department. This application having been denied by departmental decision of April 27, 1871, was subsequently reinstated by Secretary Delano, and his decision that it should stand, as if the latter decision had not been made, left such application in a condition that it can properly be heard by you as Secretary of the Department. The rule that when a case has once been finally settled by a predecessor in a Department it is not to be reopened by his successors, except upon a new condition of facts or law, has no application. Nor is the case the less properly before the

Case of the New Idria Mining Company.

Department by reason of the letter by authority of President Grant of June 1, 1875, to which my attention has been called by the counsel of Mr. McGarrahan. President Grant had previously directed that his name should not be affixed to a patent for the New Idria Mining Company, but the examination into the validity of its claim for a patent had proceeded; and on June 1, 1875, a letter was written by his authority, in which it is stated "that while he thinks there is sufficient evidence on which to issue a patent" to it, he deems it better "to defer final action until the meeting of Congress, and then refer the whole matter to that body for instructions." Neither this letter nor his previous action show final action by President Grant, or by the Department by his direction, disallowing the claim for a patent by the New Idria Mining Company. The matter was simply deferred to a Congress which subsequently met and whose term is now expired, which gave no instructions in the premises. The case is therefore properly still pending.

I proceed therefore to consider the two questions which are involved in your inquiry.

First, the effect of the action taken by Congress, in my opinion, offers no obstacle to the hearing or the determination asked for, nor is any obstacle offered by any action that may be hereafter anticipated from Congress. On the contrary, the petitioners have a right to have their claim adjudicated upon the law as it now stands. All cases presented to the Department of the Interior are to be heard and determined by the Secretary without regard to any legislation which it may be imagined or suggested will take place. Even if it were a matter of discretion as to whether or not action should be delayed in the present case on account of anticipated legislation, I should have no hesitation in saying that it should not. The investigation ordered by Congress has been had. It was reported at the meeting of the last Congress by the President, who transmitted the report of Major Hammond, to whom the investigation had been confided. Upon that report no action took place, and that Congress has now passed out of existence. A reasonable opportunity has therefore been afforded to Congress, should

Case of the New Idria Mining Company.

it desire to act in this matter. I do not, however, base my opinion upon this ground, as I entirely concur with the opinion of Attorney-General Hoar of June 22, 1869, (13 Opin., 113.) No one can be deprived of his legal rights upon the possibility that the law may some time or other thereafter be changed, and nothing but a repeal *quo ad hoc* of the statute which prescribes your ordinary duty can relieve you of the obligation which you are under to hear and determine the rights of the party petitioning. I am therefore of opinion, so far as any anticipated legislation of Congress is concerned, that it is your duty now to proceed and determine the matter of the application of the petitioners.

Second, as regards the case now pending before the Supreme Court of the United States. It is the right of the Department of the Interior to decide the questions before it irrespective of any questions pending in the Supreme Court, which is another and distinct tribunal. But while this is the case, that tribunal is the one intrusted with the determination, as a court of last resort, of the question whether any patent has been issued to McGarrahan, as alleged by him, and also whether it is valid. It would be extremely unfortunate if that patent shall be decided by the Supreme Court to have been, properly issued and to be valid, after a contrary decision shall have been made by the Department of the Interior. It is entirely appropriate that the Department should avail itself of every means that can be obtained of deciding the question before it correctly, and in the exercise of a sound discretion it seems to me that it may with propriety delay its decision of the question presented by the New Idria Mining Company until the case now pending in the Supreme Court has been heard. The action there is an action between private parties, and the decision of the Supreme Court upon the subject will be conclusive as between the parties to that controversy, who are the New Idria Mining Company and McGarrahan. The question there presented is one as to the effect of certain official action in the Department, and it would be a misfortune if the Interior Department were in its decision to come in conflict with that of the Supreme Court as regards the character or validity of its own official action. While it

Case of the New Idria Mining Company.

has been held by the supreme court of California that even if the action of the Department was such as McGarrahan claims it to be, namely, that a patent was actually granted to him by the Department of the Interior, yet that such patent was improvidently issued and of no legal validity, it cannot authoritatively be said that the appeal to the final tribunal has been frivolously taken. It has been prosecuted apparently in good faith and with reasonable expedition. Few questions in litigation can be pronounced as beyond all legal doubt. While you have the undoubted power to proceed without regard to the pendency of this case in the Supreme Court of the United States, yet you are entitled to exercise your judgment as to whether it is advisable to await the decision of the court and avail yourself of the light which may be thus thrown upon the matter, or to make a final determination. In determining whether you will delay, all circumstances should be taken into consideration, and it is to be observed that this case is one standing upon the docket of the Supreme Court in such a position that it must very shortly be reached for hearing. It is further to be considered that the New Idria Mining Company are in actual possession of the tract in question, and that they do not suffer any actual damage through the delay by reason of the fact that any other person is in occupation of the property for which they claim to be entitled to a patent. Upon this second clause of your question, I am therefore of opinion that, if the company desire a present hearing, they are entitled to have one with all reasonable expedition in the Department; but that if you think justice requires that you should delay your decision until a decision of the Supreme Court of the case referred to, or at any rate until an adjudication of the question which is now presented to that court, namely, the question whether the patent, assuming one to have been issued, was invalid, you may properly do so, having regard to all your obligations as an administrative officer.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

Revenue-Cutter Service.

REVENUE-CUTTER SERVICE.

Officers in the revenue-cutter service belong to the civil service of the United States, as contradistinguished from the naval and military, and are subject to removal by the President with the concurrence of the Senate.

DEPARTMENT OF JUSTICE,

November 13, 1877.

SIR: I have the honor to return herewith the statement of Mr. J. Wall Wilson, late an officer in the revenue-cutter service, which you recently referred to me. It appears by this paper that in January, 1872, he was removed from office by the President with the consent of the Senate, by the appointment and confirmation of a successor, and the purpose of the reference of the paper to me, I understand, is to elicit my opinion as to the validity of the removal.

At the period of the removal, officers in the revenue-cutter service were, by the ninety-ninth section of the act of March 2, 1799, chap. 22, as they still are by section 2760 of the Revised Statutes, to be deemed "officers of the customs." They were then and are now in the civil service of the Government, as contradistinguished from the naval and military. The laws governing the tenure of offices in the latter branches of the public service have, accordingly, no application to them. Being in the civil service, they were, at the period mentioned, subject to removal by the President, with the concurrence of the Senate, at the discretion of the former.

Assuming, then, that the removal in this case was made by the President with the consent of the Senate, I see no ground on which to question its validity. Respecting the propriety of the removal under the circumstances stated by Mr. Wilson, I do not feel that I am called upon by you to express any opinion. If injustice was done to Mr. Wilson in this matter, I see no mode in which it can now be directly remedied. He may, however, be reappointed, should a vacancy occur in the revenue service, upon the necessary proof of qualification. (See section 2752, Rev. Stat.)

I am, sir, very respectfully, your obedient servant,
CHAS. DEVENS.

The PRESIDENT.

Case of the Chesapeake and Ohio Railroad Company.

CASE OF THE CHESAPEAKE AND OHIO RAILROAD COMPANY.

The Chesapeake and Ohio Railroad Company, being under no obligation by contract or otherwise to convey the mail from Charlottesville to the University of Virginia, (at which point the company several years ago discontinued its station, and has since declined there to receive or deliver passengers, freight, or mails,) is entitled to the sum of \$1,850, withheld from its pay as a mail carrier to defray the expense of that service.

DEPARTMENT OF JUSTICE,

November 19, 1877.

SIR: Yours of the 14th instant, received upon the 16th, relative to the validity of the claim of the Chesapeake and Ohio Railroad Company to \$1,850 postal pay, withheld to defray the expense of wagon-carriage of the mails from Charlottesville to the University of Virginia, at which point the railroad company several years ago discontinued its station and has since declined there to receive or deliver passengers, freight, or mails, has had prompt attention.

In the exercise of its constitutional power, Congress has declared "all railways and parts of railways which are now or may hereafter be put in operation" post roads. (Act of June 8, 1872, chap. 335, sec. 201, 17 Stat., 308; chap. 146, sec. 3, 10 Stats., 255.) The University of Virginia is an established post-office upon such a post route.

Whether or not Congress can, in the further exercise of its constitutional power, make it obligatory upon railway companies to take and deliver mails at every post-office along its line, it is unnecessary to consider; it is sufficient that it has not done so, except that it enacted that all *land-grant* roads "shall carry the mail at such prices as Congress may by law provide," the Postmaster-General fixing the compensation if Congress takes no action on the subject. (Rev. Stat., sec. 4001.) The Chesapeake and Ohio Railroad is not understood to come within the terms of this section, but to belong to the class of roads which have received no grants from the United States, as to which the obvious expectation is that the only service required of them will be that which, by some contract, they have agreed to render. If they refuse to carry the mails, section 3999 provides for their being con-

Office of Collector of Customs—Abeyance.

veyed "by horse-express or otherwise," under contract. This corporation refused to contract for the delivery of a mail at the University of Virginia, and have steadily protested against any deduction from the sum to which the statute entitles them for the service they do render, in order to pay the expense of wagon-carriage of this mail from Charlottesville to the University. It is not perceived how, under existing legislation, they can be compelled to carry a mail to any post-office against their will and without any contract for its delivery there; nor how they can properly be compelled to pay, for the performance by another of a service which the company is under no obligation to perform, and which it has expressly refused to undertake without being specially compensated therefor. In my opinion the Chesapeake and Ohio Railroad Company are entitled to have their full quarterly pay without deducting the \$25 per month paid by the United States for the carriage by wagon of the mails between Charlottesville and the University of Virginia.

The papers accompanying your letter are herewith returned.

Very respectfully,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

OFFICE OF COLLECTOR OF CUSTOMS—ABEYANCE.

Where the office of collector of customs is in "abeyance," the duties thereof, whilst it remains in abeyance, may lawfully be performed by his special deputy, if there be one; if there be no such deputy, then by the naval officer, and so on, as provided in section 2625 Rev. Stat., in the order there named.

The authority to exercise the duties of the office in that case is, however, not imparted by section 2625, but by section 1769 Rev. Stat., within the terms of which latter section the above-named officers (in the order referred to) come, agreeably to the construction given.

DEPARTMENT OF JUSTICE,
December 4, 1877.

SIR: The office of collector of customs at the port of New Orleans having become vacant during the last recess of the

Office of Collector of Customs—Abeyance.

Senate, the President during the same recess filled the same by a temporary appointment, and at the next ensuing (the recent) session of the Senate sent to that body a nomination for the office, which was not confirmed when the session ended. The office thereupon became again vacant, and at the same time it passed into "abeyance" by force of section 1769 of the Revised Statutes.

The inquiry is, what provision, if any, does the law make for the performance of the duties of the office while it remains in abeyance?

Section 1769, by which the office was put in abeyance "until it is filled by appointment thereto by and with the advice and consent of the Senate," provides that during this period "all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

By section 2625 Revised Statutes, in case of the *disability or death* of the collector, his powers and duties devolve upon his special deputy (*i. e.*, the deputy constituted under his hand and seal, as authorized by section 2630 Rev. Stat.); if there be at the time no such deputy, then they devolve upon the naval officer; if there be no naval officer, then upon the surveyor of the same port; and if there be no such surveyor, then upon the surveyor of the nearest port within the district.

This section obviously provides for the case of a vacancy in the collectorship where it is caused by the "death" of the incumbent, declaring who, in the latter event, shall perform the duties of the office. And the term "disability," as used therein, has been held to comprehend any cause whereby the officer becomes no longer capable of discharging the duties of the office, and in this sense to include a resignation. (14 Opin., 260.) According to this interpretation, the section covers vacancies arising otherwise than by death.

But assuming that there is but one case of vacancy contemplated in section 2625, namely, that caused by death, yet there being an officer designated therein who may by law exercise the powers and duties of collector in such a vacancy, must not the officer thus designated be regarded as the one upon whom those powers and duties are cast by section 1769 whilst the office remains in abeyance? Unless he is so regarded,

Office of Collector of Customs—Abeyance.

there would seem to be no officer upon whom such powers and duties can devolve during the abeyance of the office, since the former section contains the only provision made for the performance thereof “in case of a vacancy.”

The authority to exercise the duties of the office, whilst it remains in abeyance, is not imparted by section 2625, but by section 1769, and in determining who is to discharge them in such a case we are governed by the terms of the latter section. By this, as has been above stated, the duties are devolved upon “such other officer” as may by law perform them “in case of a *vacancy* in such office.” If, then, in the former section we find an officer who answers that description—that is to say one who may perform the duties of the office “in case of a *vacancy*” therein—such officer, inasmuch as he is within the terms of section 1769, must be deemed to be the one upon whom the duties devolve thereunder. The words “in case of a *vacancy*,” in the last-mentioned section, cannot be understood as referring to a *vacancy* which has occurred in a particular way. They are general, and apply as well to a *vacancy* happening by the death of the incumbent as to one happening by his resignation or by the expiration of his term. Indeed, the *vacancy* in an office, existing at the time it was put in abeyance by the operation of that section, may have taken place in either of those ways. So that it would seem to be sufficient under the same section, in order that the duties of the office while it is in abeyance may devolve upon another officer as thereby provided, if such other officer is authorized to discharge those duties in *some* case of *vacancy* in the office.

Agreeably to this view, the effect of the two sections, 2625 and 1769, when taken together, with respect to the contingencies for which provision is made therein, may thus be stated: In case of the *disability* or *death* of the collector, and also in case of the *abeyance* of his office, the functions thereof devolve upon his special deputy, if there be one. If there be no such deputy, then they devolve upon the naval officer, and so on, as provided in the former section.

The result at which I arrive upon the subject of the present inquiry is, that the duties of the office of collector of customs at New Orleans, so long as it continues in abeyance, may

Office of Surveyor of Customs—Abeyance

lawfully be performed by any one of the officers just indicated, according as the case may be, in the order named.

I have the honor to be, very respectfully,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

OFFICE OF SURVEYOR OF CUSTOMS—ABEYANCE.

The duties of the office of surveyor of customs, whilst it is in "abeyance," are, by section 1769 Rev. Stat., construed in connection with section 2625 Rev. Stat., devolved upon such customs officer as the collector of the district may authorize to perform them.

DEPARTMENT OF JUSTICE,
December 4, 1877.

SIR: I have considered the following case and question upon which you desire my opinion:

During the recess of the Senate immediately preceding the recent extra session of Congress, a vacancy existed in the office of surveyor of the port of New York, by reason of the expiration of the term of the incumbent. A nomination for the office was sent by the President to the Senate during that session, but it was not confirmed when the session expired. The office thereupon became "in abeyance" by operation of section 1769 Revised Statutes. Does the law provide for the performance of the duties of the office whilst it is in abeyance?

This case is similar to the one relating to the collectorship at New Orleans, which also involved a similar question, upon which I have already had the honor to state my views in an opinion dated this day. The reasoning of that opinion is applicable to the present inquiry, when section 2625 of the Revised Statutes is taken in conjunction with section 1769. And it leads directly to this result: that in case of *abeyance* of the office of surveyor, as well as in the case of the *disability* or *death* of the surveyor, the collector of the district may authorize some other customs officer ("some fit person," in the words of the statute) to perform the duties of the office, who, being so authorized, can lawfully discharge them until the office "is filled by appointment thereto, by and with the advice and consent of the Senate."

Wrecked Vessel—Issue of Register.

I am therefore of the opinion that adequate provision is made by those two sections for the performance of the duties of the office of surveyor whilst it remains in abeyance—that these duties are thereby devolved upon such customs officer as the collector of the district may authorize to perform them.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

WRECKED VESSEL—ISSUE OF REGISTER.

The word "wrecked," as used in section 4133 Rev. Stat., is applicable to a vessel which is disabled and rendered unfit for navigation, whether this condition of the vessel has been caused by the winds or the waves, by stranding, by fire, by explosion of boilers, or by any other casualty. To authorize the issue of a register under that section, it is sufficient if the cost of repairing the vessel—as well where, in so doing, the original plan of the vessel is departed from and changes in her construction and internal arrangement are made, new machinery, new appliances for her navigation, and other improvements introduced, as where the vessel is simply restored to what she originally was>equals three-fourths of her value when repaired.

DEPARTMENT OF JUSTICE,
December 5, 1877.

SIR: Your letter of the 21st ultimo presents for my consideration the following case and questions:

"First. A foreign-built steamship explodes her boiler within the waters of the United States, and, thereby becoming disabled for navigation as a steam-vessel, is towed into port. Does the disability constitute such a 'wreck' as is contemplated by the statute?

"Secondly. In the allowance of items for repairs to such a vessel, can the cost of new boilers and new machinery, the necessary repairs to the iron plating to the hull, and new spar-deck and improved accommodation for passengers, with new appliances of the character required by law on steam-vessels, be included under the statute provisions that the repairs put upon such vessel shall be equal to three-fourths of the cost of the vessel when repaired?"

Wrecked Vessel—Issue of Register.

The statute referred to in these inquiries is section 4136 of the Revised Statutes, which provides: "The Secretary of the Treasury may issue a register or enrollment for any vessel built in a foreign country, whenever such vessel shall be wrecked in the United States and shall be purchased and repaired by a citizen of the United States, if it shall be proved to the satisfaction of the Secretary that the repairs put upon such vessel are equal to three-fourths of the cost of the vessel when so repaired."

This section reproduces the provisions of the act of December 23, 1852, chap. 3, in force at the time of the adoption of the Revised Statutes. Before the passage of that act, applications had been frequently made to Congress for special legislation authorizing registers to be granted to foreign-built vessels, in cases where such vessels had become damaged, disabled, and unseaworthy, and, having been purchased while in that state by American citizens, were repaired by the latter at ports or places within the United States. The practice of that body had been to allow these applications upon conditions similar to the one contained in the act of 1852 and now found in said section 4136, namely, that it should be proved to the satisfaction of the Secretary of the Treasury that the cost of the repairs "exceeds three-fourths of the original cost of building a vessel of the same tonnage," or is "equal to three-fourths of the original cost of building a vessel of the same tonnage," or "exceeds three-fourths of her value after having been so repaired," or "is equal to three-fourths of the value of said vessel at the time of said repairs," &c. Instances of special legislation authorizing registers to be granted in cases of that sort may be seen in 6 Stat., pp. 313, 371, 458, 753, 831, 914; 9 Stat., pp. 686, 695, 709, 710, 713, 714, 719, 732, 757, 796, 798; 10 Stat., pp. 725, 726, 728, 731, 741, 753, 767, 785, 835, 844.

The object of the act of 1852 was to do away with the necessity for special legislation in such cases, by conferring upon the Secretary of the Treasury a *general authority* to issue registers or enrollments in like cases upon the like condition. Keeping this in view, and at the same time considering the varied character of the cases which had theretofore been the subjects of special legislation, the word "wrecked," as used

Wrecked Vessel—Issue of Register.

in that act, and also in section 4136, must be taken in a very comprehensive sense. It is, I think, to be understood as applicable to a vessel which is disabled and rendered unfit for navigation, whether this state of the vessel has been caused by the winds or the waves, by stranding, by fire, by explosion of boilers, or by any other casualty.

With regard to the "repairs," it does not seem to me to be contemplated by the statute that these should be confined to the mere replacement of the lost or damaged parts of the vessel by new material, or to making her just as she was before becoming disabled. The policy of our general navigation law, so far as it requires vessels to be American built as well as American owned in order to entitle them to registry, looks to the encouragement and promotion of our ship-building interests. In the case of a disabled foreign-built vessel, purchased and repaired in one of our ports by an American citizen, the requirement that, to entitle her to registry, the cost of the repairs must be equal to three-fourths of her value when so repaired, is founded upon the same policy, although her admission to registry, upon this requirement being satisfied, is in some measure a relaxation of that policy. If therefore, in such case, the original plan of the vessel was departed from in putting her in repair, and changes in her construction and interior arrangement were made, new machinery, new appliances for her navigation, and other improvements introduced, whereby she became, in many respects, different from what she was originally, this, it is manifest, as much accords with the policy of the law as if the repairs had been limited to restoration of the vessel simply to what she originally was; the ship-building interests being no less promoted by the former than they would be by the latter. It is, then, sufficient if the cost of making the vessel navigable and seaworthy, whether in the one way or the other, equals three-fourths of her value when that is accomplished.

Accordingly, to each of the questions propounded by you I have the honor to give an affirmative answer.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

Indian Agents and Agencies.

INDIAN AGENTS AND AGENCIES.

Under section 2053 Rev. Stat., the President has discretionary power to dispense with the services of any Indian agent; and, under sections 1224 and 2062 Rev. Stat., he is authorized to assign a military officer to execute the duties of such agent, if this can be done without separating the officer from his company, regiment, or corps, or otherwise interfering with the performance of his military duties; or, under section 2053 Rev. Stat., he may devolve the duties of such agent upon an agent who has been appointed for another agency.

The President can, under section 2059 Rev. Stat., discontinue any agency, whereupon the functions of the agent would cease. He can also, under the same section, transfer the agency to another place; for instance, to the vicinity of a military post, should it be contemplated to require a military officer to perform the duties of agent.

Under section 2045 Rev. Stat., an Indian agent may, *at any time*, be suspended, and the place temporarily filled in the mode there provided.

DEPARTMENT OF JUSTICE,
December 6, 1877.

SIR: Referring to your oral inquiry of me yesterday, whether any authority existed during the session of the Senate by which Indian agencies might be turned over, temporarily, to military or other officers of the United States, if it should be deemed necessary at once to take such agencies out of the hands of those in whose hands they now are, I have the honor to reply:

It has been held (upon consideration of the provisions of sections 1222, 2062, and 1224 of the Revised Statutes) that the President can assign an officer of the Army on the active list to perform the duties of Indian agent, but that the exercise of the power is subject to the following restriction, namely: that the performance of those duties does not require the officer to be separated from his regiment or company, or otherwise interfere with the performance of his military duties. (14 Opin., 573.)

By section 2053 Rev. Stat., it is made the duty of the President to dispense with the services of such agents "as may be practicable," and also to require the same person to perform the duties of two agencies for one salary where it is practicable.

By section 2059 Rev. Stat., he is authorized, whenever he

Indian Agents and Agencies.

may deem it expedient, to discontinue any agency, or transfer the same to such other place as the public service may require.

Furthermore, under section 2045 Rev. Stat., an Indian inspector has power to suspend any agent, and to designate a person to fill the place temporarily, subject to the approval of the President.

The law which is embodied in section 2045 was passed on the 14th of February, 1873, subsequently to the acts of March 2, 1867, and April 5, 1869. I do not find that any powers given by these sections are controlled by the fact that the Senate is now in session, or by any of the provisions of sections 1767, 1768, and 1769, Rev. Stat., commonly called the "tenure-of-office act."

From the foregoing sections, I am therefore of opinion:

First. That the President may, in his discretion, (under section 2053,) dispense with the services of any Indian agent, and (under section 2062, considered with section 1224,) assign a military officer to execute the duties of such agent, if this can be done without separating the officer from his company, regiment, or corps, or otherwise interfering with the performance of his military duties.

Second. That, when the services of an agent are thus dispensed with, the President may (under section 2053) devolve the duties upon an agent who has been appointed for another agency.

Third. That he may (under section 2059) discontinue any agency, in which case the functions of the agent would cease.

Fourth. That he may (under the last-mentioned section) transfer the agency to another place; for instance, to the vicinity of a military post, should it be contemplated to require a military officer to perform the duties of agent.

Fifth. That an Indian agent may be suspended (under section 2045) in the mode there provided, namely, by the Indian inspector, and a person designated by such inspector to fill the place temporarily, subject to the approval of the President.

This case must be considered in the nature of an exception

Case of Captain Adam Badeau.

to the general provisions of law in reference to the suspension of officers while the Senate is in session.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

CASE OF CAPTAIN ADAM BADEAU.

In 1870, B., a retired officer of the Army, was appointed to and accepted the office of consul-general at London. Since his appointment his name has been borne on the Army Register as a retired officer, but he has not received pay as such. He is not of the class of retired officers described in the *first proviso* of section 2 of the act of March 3, 1875, chap. 178: *Held*, upon consideration of the provisions of sections 1094 and 1223 Rev. Stat., (the latter section embodying so much of section 2, act of March 30, 1868, chap. 38, as related to officers of the Army,) together with section 4 of the act of 1875 aforesaid, that B. has ceased to be a retired officer of the Army by effect of the statutory provision embodied in said section 1223, and that his name cannot legally be continued on the retired list.

Agreeably to the *intent* of Congress, the clause in the second section of the act of March 3, 1875, referring to the provisions of section 2 of the act of March 30, 1868, must be deemed to limit the operation of section 1223 Rev. Stat.

The words "every such officer," as used in the first proviso of section 2 of the act of 1875, cover all retired officers who are included within the preceding part of the same proviso, but do not apply to others.

DEPARTMENT OF JUSTICE,

December 11, 1877.

SIR: I have considered the question submitted to me by your letter of the 16th ultimo in regard to the case of Capt. Adam Badeau, United States Army, retired, at present holding the office of consul-general at London.

It appears by the report of the Adjutant-General, which accompanied your letter, that in the year 1870, or thereabouts, Captain Badeau, being then on the retired list of the Army, was appointed United States consul-general at London; that since this appointment his name has been borne on the Army Register as a retired officer, but that he has not received pay as such; and that he does not belong to the class of retired officers described in the *first proviso* of section 2 of the act of

Case of Captain Adam Badeau.

March 3, 1875, chap. 178, (*i. e.*, "officers who had been in service as commissioned officers twenty-five years at the date of their retirement," and "retired officers who had lost an arm or leg or had an arm or leg permanently disabled by reason of resection on account of wounds, or both eyes by reason of wounds received in battle.")

The question on which you request my opinion is "as to the legality of continuing his name on the retired list in the future editions of the Army Register." This involves the inquiry whether Captain Badeau, by his acceptance of the office of consul-general, has or has not ceased to be a retired officer of the Army.

The statutory provisions bearing upon this inquiry are contained in sections 1094 and 1223 of the Revised Statutes and in section 2 of the act of March 3, 1875, cited above.

By section 1094, officers on the retired list are declared to be a part of the Army.

• Section 1223 provides: "Any officer of the Army who accepts or holds any appointment in the diplomatic or consular service of the Government shall be considered as having resigned his place in the Army, and it shall be filled as a vacancy."

The latter section embodies so much of section 2 of the act of March 30, 1868, chap. 38, as related to officers of the Army; and, in an opinion which I had the honor to communicate to you on the 11th of June last, it was said that it "applies to all officers, whether upon the active or retired list of the Army, and must be deemed to enact that any officer, upon either list, accepting an appointment in the diplomatic or consular service, is to be treated as having resigned his place in the Army." This view of the effect of section 1223 is supported by the fact that in the act of March 3, 1875, there is a provision (see the extract from this act quoted below) which virtually excepts from the operation of that section a particular description of retired officers of the Army, and which clearly proceeds upon the same view; thus, as it were, giving the section a legislative construction corresponding thereto.

Section 2 of the act of March 3, 1875, declares "that all officers of the Army who have been heretofore retired by

Case of Captain Adam Badeau.

reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list placed upon it on account of wounds received in action: *Provided*, That no part of the foregoing act shall apply to those officers who had been in service as commissioned officers twenty-five years at the date of their retirement; nor to those retired officers who had lost an arm or leg, or has an arm or leg permanently disabled by reason of resection on account of wounds, or both eyes by reason of wounds received in battle; and every such officer now borne on the retired list shall be continued thereon, notwithstanding the provisions of section 2, chapter 38, act of March 30, 1868." The remainder of the section is immaterial.

By the last clause of this enactment (viz, "and every such officer now borne on the retired list shall be continued thereon," &c.) certain retired officers, as has already been intimated, are excepted from the operation of section 1223. Although the clause in terms refers to section 2 of the act of 1868, and does not name section 1223, yet, as the latter section reproduces the provision contained in the former section, which at the time of the passage of the act of 1875 was no longer in force, (having been superseded by section 1223,) it must be deemed to be agreeable to the *intent* of Congress to hold that the clause limits the operation of section 1223, since otherwise it would be without any effect.

Thus, whether Captain Badeau has or has not ceased to be a retired officer appears to depend entirely upon the meaning and scope of the expression "every such officer," in the clause just adverted to. To what officers described in the preceding part of the section is the relative "such" to be applied? Regarded from a grammatical point of view, this word might perhaps be taken to refer only to the next antecedent, which would confine its application to "those retired officers who had lost an arm or leg, or has an arm or leg permanently disabled by reason of resection," &c. But the legal construction must be controlled by the context; and, guided

Relative Rank in the Army.

by the sense of the context, I think the word "such" may well be taken to refer to all officers mentioned in the preceding part of the *proviso* of the section, but that this is the utmost limit to which it can with propriety be extended. The *proviso* withdraws from the operation of the general provisions of the act certain retired officers who, though described in two apparently distinct clauses—part in one and the remainder in the other—are nevertheless to be viewed as if they were all embraced in but one clause; and, when so viewed, the application of the words "and every such officer" in the next succeeding clause manifestly reaches all retired officers who are within the preceding part of the *proviso*. To extend the application of these words to other retired officers—to those who are included in the general provisions of the act, but who are not included in the *proviso*—is not warranted by any rule of interpretation; on the contrary, it would be at variance with their plain and natural import.

Upon the facts hereinbefore set forth, collected from the report of the Adjutant-General, and by the foregoing considerations, I am unavoidably brought to the conclusion that Captain Badeau has ceased to be a retired officer of the Army by the effect of the statutory provision embodied in section 1223, above cited; and, in direct answer to the question submitted by you, I have the honor to state that, in my opinion, his name cannot therefore be now legally continued on the retired list.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

RELATIVE RANK IN THE ARMY.

The provision in the second clause of paragraph 5, Army Regulations of 1863, for determining the rank of officers of different regiments or corps whose commissions are of the same date and grade, which reads: "2d. By former rank and service in the Army or Marine Corps," considered and construed.

The word "Army," as there employed, is to be understood as embracing the entire military forces of the United States, whether regular or volunteer.

Relative Rank in the Army.

The word "service" does not mean service in all capacities, but service in the former rank; i. e., as a commissioned officer.

Accordingly, where the former service of two officers was in different grades (whether in the regular or volunteer army), the one who served in the higher grade is entitled to the superior rank; where both officers hold the same grade, the one who served the longer in that grade is to be preferred.

DEPARTMENT OF JUSTICE,

December 15, 1877.

SIR: I have the honor to reply to your letter of November 30, respecting the claim of First Lieutenant Merritt Barber, Sixteenth Regiment of Infantry, to rank First Lieutenant Henry C. Ward, of the same regiment.

You state that the present commissions of these two officers are dated of the same day; that their original entry into the Regular Army as second lieutenants was on the same day; that both officers had previously served as captains in the Volunteer Army; and that "while the entire period of the former's (Barber's) service as a commissioned officer in that force exceeded that of the latter (Ward), Mr. Ward's entire service in all capacities was the longer."

On these facts you desire my opinion as to the proper relative position of these officers in the service.

The act of March 2, 1867, makes the relative rank of officers of the same grade, having commissions of the same date, to depend upon the comparative length of their former service as commissioned officers in the Regular Army or in the Volunteer Army during the late war. But this act, in so far as it has any retrospective operation, is limited to appointments made under the act of July 28, 1866, and has therefore no bearing on the present case, the date of the original appointments of both officers being February 23, 1866, which was before the act of 1866 was passed. Their subsequent transfer from different regiments into the Sixteenth Infantry was in no sense an "appointment" to be commissioned officers, for they continued to serve under their former commissions.

There being no other statute on the subject, this compels a resort to the Army Regulations of 1863, paragraph 5, which reads as follows:

"5. When commissions are of the same date, the rank is

Relative Rank in the Army.

to be decided between officers of the same regiment or corps by the order of appointment. Between officers of different regiments or corps, 1st. By rank in actual service when appointed; 2d. By former rank and service in the Army or Marine Corps; 3d. By lottery among such as have not been in the military service of the United States." * * *

The original appointments of Lieutenants Ward and Barber as second lieutenants were in two different regiments, afterwards consolidated into the Sixteenth Infantry. This, in connection with the fact that their commissions were of the same date, brings their case within the second clause of the paragraph, which is "by former rank and service in the Army or Marine Corps."

It is not reasonable to suppose that the Regulations of 1863 had reference to the Regular Army alone, which constituted but a small portion of the immense military force then in the field. I think therefore that, in the phrase "former rank and service in the Army," the word "Army" must be taken in its most comprehensive sense, as embracing the entire military force of the United States, whether regular or volunteer.

If this construction be not adopted, no criterion exists by which the relative rank of these two officers can ever be ascertained. For, in the first place, none is furnished in the act of 1867, which applies, retrospectively, only to appointments made under the act of 1866; and, in the second place, the only other criterion provided by law or by regulation is "by lottery among such as have not been in the military service of the United States;" which is obviously inapplicable to the present case, since both these officers had been "in the military service of the United States."

The criterion established by the regulations is "former rank and service." I can see no warrant for construing this as meaning "service in all capacities." No such criterion has ever been mentioned either before or since these regulations were made. On the contrary, the act of 1867 makes relative rank to depend upon the comparative length of former service "as a commissioned officer." And certainly, if it ever was intended that former service in the ranks was to be taken into account in fixing relative rank, it would have been when

Disposal of Gold Coin.

this act was passed; it being then well known that thousands of patriotic men, fully competent to hold commissions, had gallantly and faithfully served through the war. I think, therefore, that the words "and service" were not intended to mean "service in all capacities," but service in the former rank.

On the whole, after a very careful examination of the subject, I have come to the conclusion that the proper interpretation of the clause in question is as follows: That when the former service of the officers was in different grades, the one who served in the higher grade is entitled to the superior rank; that when both officers held the same grade, the one who served the longer in that grade is to be preferred.

Lieutenant Barber's former service as captain appearing from the papers transmitted to have been longer than Lieutenant Ward's in the same grade, I am of opinion that Lieutenant Barber is the ranking officer.

The papers accompanying your letter are returned herewith.

I have the honor to be, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,

Secretary of War.

DISPOSAL OF GOLD COIN.

The Secretary of the Treasury has authority, under section 3699 Rev. Stat., to fix a currency price for disposing of gold within a limited period, subject to his power at any time to terminate the period for which the limit was made, or to change such price so as to conform to the market rate.

His authority to dispose of the gold is subject to no limitation as to amount, except that which is imposed by the same section.

DEPARTMENT OF JUSTICE,

December 17, 1877.

SIR: In answer to the inquiry of your letter of the 12th instant, as to whether, under section 3699 of the Revised Statutes, the Secretary of the Treasury is authorized to fix a price for gold for a limited number of days, with a discretionary right to terminate at pleasure the period for which the limit is made, I have the honor to say:

Disposition of Gold Coin.

The section referred to, after providing that the Secretary of the Treasury may anticipate the payment of interest on the public debt, adds: "And he is authorized to dispose of any gold in the Treasury of the United States not necessary for the payment of interest of the public debt. The obligation to create the sinking fund shall not, however, be impaired thereby."

The authority given by this section is full and ample to dispose of the gold not needed for the payment of interest on the public debt in any manner that the Secretary of the Treasury may deem most for the public interests. No limitation is prescribed as to notice to be given by him, or as to the amount which he may sell, other than the one indicated. That this was so intended at the time this statute was passed is evident from examining the debate which accompanied it. While the contemporaneous construction given in legislative discussion is not conclusive, it is often important to be considered in deciding the true intent and meaning of an act. By examining this discussion, (Cong. Globe, 1st sess. 38th Cong., pt. 2, pp. 1023-'44-'45, 1136,) it will be seen that it was fully contemplated that the power given to the Secretary should not be subject to any limitation except the one distinctly indicated, and that he was invested thereby with the largest discretion.

I am therefore of opinion that if the Secretary of the Treasury deems that, by fixing a currency price for gold within a limited period, subject to his power at any time to terminate the period for which the limit was made, or to change such price so as to conform to the market rate, he is exercising a wise discretion in order to facilitate the sale of the bonds of the United States, he may properly do so. In so doing, however, he should keep before him the object intended to be reached by the act of July 14, 1870, commonly known as the "refunding act," and that of January 14, 1875, commonly known as the "resumption act."

Very respectfully, your obedient servant,
CHAS. DEVENS

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Privileged Communications.

PRIVILEGED COMMUNICATIONS.

An officer, under authority of the Treasury Department, advertised for proposals to furnish fuel. C., a bidder, addressed a communication to the officer relating to the responsibility of H., another bidder. The officer, in obedience to his instructions, submitted to the Department the bids received by him, and with them he forwarded the said communication. An action for libel having been brought by H. against C., and interrogatories therein concerning said communication filed in the Department: *Held* that the communication cannot properly be treated by the Secretary as a privileged one.

In general, only such communications as are made in the course of their official duties by the persons making them come within the rule of privileged communications, and are confidential under all circumstances. But in certain cases (indicated in the opinion) communications other than those of officials may be treated as confidential, and in these cases the Department would be justified, upon public considerations, in declining to furnish copies of such communications on the order of a court.

DEPARTMENT OF JUSTICE,

December 17, 1877.

SIR: In your communication of the 11th instant you inquire whether certain interrogatories should be answered, which are filed in an action for damages on account of an alleged libellous letter claimed to have been written by one Cary.

The circumstances under which it was written were that in the summer of 1876 the United States marshal for the district of Maryland, under authority from the Treasury Department, advertised for proposals for coal for the Baltimore court-house, and in response thereto received several proposals. The plaintiff in the case in which Cary is defendant was one of the bidders, and the defendant was himself a member of a firm which submitted a bid. The marshal, in obedience to his instructions, submitted to the Treasury Department the bids received by him, and also forwarded with them several communications addressed to him relating to the responsibility of Mr. Hurt, the plaintiff in the action referred to, one of which letters was from the defendant Cary.

Your inquiry is whether or not the letter of the defendant Cary is to be treated as privileged and confidential.

Such communications cannot properly be treated as privileged communications. They are not of the character of communications made between servants and officers of the Gov-

Privileged Communications.

ernment, and in the discharge of a public duty by the person making them. If they were held to be privileged, it is obvious that the most malicious and unfounded complaints might be made with impunity. (*Blake vs. Pilfold*, 1 Moody and Robinson, 198.) In the present case no duty was imposed upon the defendant Cary to communicate his views or opinion as to the responsibility of Hurt; and, if he chose to make such a communication, he did it under the same responsibility for his acts that would be incurred by any person who saw fit to make a report upon the pecuniary responsibility of another.

In answer to your general inquiry to what extent communications addressed to your Department by persons not officially connected therewith can be regarded as confidential, and to what extent the Department will be protected in declining to furnish copies of such communications upon the order of a competent court, I reply:

The only communications deemed by me to come within the rule of privileged communications, and therefore confidential under all circumstances, are such as are made in the course of their official and public duties by the persons making them. Other cases may occur in which, however, the Department would not be bound to furnish copies of communications. When, in the judgment of the Secretary of the Treasury, the disclosure of facts stated in communications, or of the names of the writers thereof, would be attended with serious damage to the public interest, either because it would dangerously affect persons who had honestly furnished information to the Department, or because it would prevent, by premature disclosure, the proper investigation of crimes or offenses against the Treasury, or for any other sufficient public reason, the Department would be justified in representing to the court that upon public considerations it declined to furnish such communications. The administration of justice is only a part of the general conduct of the affairs of any state or nation, and is, with respect to the production or non-production of a paper from the files of an Executive Department, subject to the general welfare of the community. (1 Greenleaf, sec. 251; *Beatson vs. Skene*, 5 Thurston and

Special Agents of the Post-Office Department.

Norman, 838; *Gray vs. Pentland*, 2 Sergeant and Rawle, 32, Tilghman, C. J.)

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

SPECIAL AGENTS OF THE POST-OFFICE DEPARTMENT.

Upon consideration of the provisions of sections 31 and 35 of the act of June 8, 1872, chap. 335: *Held* that the compensation of two special agents employed by the Postmaster-General for the free-delivery service can be paid out of the appropriation for that service.

DEPARTMENT OF JUSTICE,
December 17, 1877.

SIR: The question referred to me by your letter of December 10 is whether two special agents in the free-delivery service of the Post-Office Department can be paid out of the appropriation for that service.

By the act of June 8, 1872, section 31, the Postmaster-General is authorized to employ such number of special agents "as the good of the service and the safety of the mail may require." Section 35 directs that the salary and *per diem* of "the special agent" detailed for the free-delivery service shall be paid out of the appropriation for that service.

You state that when this act was passed but one special agent was needed for that service, but that since then two have been employed. This fact sufficiently explains why, in section 35, the term "special agent" was used in the singular number.

There is no limitation to the power of the Postmaster-General to appoint special agents; and when he determines that more than one is necessary for the free-delivery service, it is not to be inferred merely from this use of the singular number that therefore only one of those thus employed by his authority is to be paid out of the specific appropriation for that service.

It is material to observe that the other classes of special agents mentioned in the same section are directed to be paid

Contract—Per Diem Forfeiture.

out of the appropriations applicable respectively to the particular branch of the service to which they belong.

My opinion is that both the special agents employed in the free-delivery service may be paid out of the specific appropriation for that service.

The papers accompanying your letter are herewith returned.

I have the honor to be, very respectfully,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

CONTRACT—PER DIEM FORFEITURE.

A contractor with the War Department agreed to complete a certain work within a definite time, and in default thereof to forfeit \$50 a day during each and every day's delay thereafter in its completion; the amount thus forfeited "to be deducted from the amount which may be due * * * on the final completion of the work, as liquidated damages." The work was not completed by the time fixed, but it was faithfully performed, agreeably to the specifications of the contract, and the Government sustained no damage whatsoever in consequence of the delay: *Held* that the *per diem* forfeiture, according to the intention of the parties here, (which is to be ascertained from a view of the whole contract, the use of the words "liquidated damages" not being, in itself, conclusive of such intention,) must be regarded as a penalty, the object of which was to secure the Government against actual loss or damage arising from delay in the completion of the work.

The work having been completed, and no damage sustained by the delay, the conditions necessary to warrant the exaction of the penalty do not exist, and the Department is accordingly at liberty to release the contractor therefrom.

DEPARTMENT OF JUSTICE,

December 20, 1877.

SIR: Your letter of the 14th instant presents this inquiry: Whether you can release a contractor from the stipulated penalty for delay in completing his work, when the work has been faithfully performed and no damage has accrued to the United States.

In the case to which the inquiry refers, the contractor agreed to complete the work by a fixed time, and, should it

Contract—*Per Diem Forfeiture.*

not be then completed, to forfeit \$50 a day for each and every day's delay in the completion thereof after the time so fixed; the amount thus forfeited "to be deducted from the amount which may be due * * * on the final completion of the work, as liquidated damages."

The work embraced five separate and distinct items, for the completion of each of which a stated amount was to be paid the contractor; and by the terms of the contract payment for each item was to be made when such item should be completed and accepted, reserving 10 per centum from every such payment until the entire work should be completed and accepted.

In addition to the provision for a forfeiture of \$50 a day for delay in the completion of the work, the contract provided that if the contractor, in the judgment of the officer in charge, should fail to prosecute faithfully and diligently the work in accordance with the requirements of the contract, such officer should have power, with the concurrence of the Secretary of War, to annul the contract, by giving written notice to that effect to the contractor; whereupon "all money or reserved percentage due or to become due" to the contractor should be forfeited; and the officer representing the Government was thereupon authorized, if in his opinion the public exigency should require an immediate performance of the work, to proceed to provide for the same in the manner prescribed by section 3709 of the Revised Statutes, &c.

The contingency upon which the authority thus given to terminate the contract was exercisable seems not to have arisen. The contract continued until the final completion of the work; and although this did not take place at the time stipulated, yet it appears that the work was faithfully performed, in accordance with the specifications of the contract, and that no damage whatever has been sustained by the Government in consequence of the delay in the completion thereof.

The answer to the present inquiry depends upon whether the *per diem* forfeiture for delay is to be regarded as a penalty or as liquidated damages. This turns upon the intention of the parties, which, like anything else ascertainable by construction, is to be collected from the nature of the provisions and the language of the whole instrument. The use of

Contract—Per Diem Forfeiture.

the term "liquidated damages," or of the term "penalty," is not, of itself, conclusive of that intention. (*Betts vs. Burch*, 4 H. & N., 511; *Sparrow vs. Paris*, 7 H. & N., 599; *Dimech vs. Corlett*, 12 Moore's P. C., 229; *Throughgood vs. Walker*, 2 Jones N. C., 15.)

The provision of reserving 10 per centum on the payment for each of the various items of the work until the completion of the whole, with a liability to forfeiture in case the contract should in the meantime be annulled, was designed to secure the performance of the work and to afford the means of compensating the Government for any damage resulting from failure to perform. So the provision declaring that, upon the annulment of the contract, all money (including the reserved percentage) due or to become due should be forfeited, was designed to protect the Government against loss by damage from the failure of the contractor to faithfully and diligently prosecute the work in accordance with the requirements of the contract. But in neither of these provisions could it have been contemplated that the percentage reserved or the money "due or to become due," over and above the damage actually sustained by the Government, should belong to the latter. The other provision, which declares a *per diem* forfeiture for delay, is of the same character, its object being to secure the Government against any loss thence arising. This differs from the other provision imposing a forfeiture, in that the amount forfeited is to be deducted as "liquidated damages." Yet, notwithstanding the employment of that term, it is consistent with the purpose of this provision, and more in harmony with the other provisions mentioned, to construe the former as a penalty merely; that is, as intended to satisfy any damage actually sustained by the Government, but not otherwise to inure to the benefit thereof.

Viewed as a penalty, no right to the *per diem* forfeiture becomes vested in the Government by force of the agreement until damage arises; and if no right thereto has thus become vested in the Government, it is plain that a release of the contractor therefrom would not involve the relinquishment of any indebtedness from him to the Government, or the abandonment of any legal claim of the latter upon him.

Dismissal of Officer in the Marine Corps.

Hence, in such case, the question of authority to relieve from the payment of a debt or demand owing the Government would not be presented.

The contract (as I understand from your letter) having been *faithfully performed*, and *no damage whatever* having been sustained by the Government by reason of the delay in its performance, the conditions which, in the contemplation of the agreement, are necessary for the exaction of the penalty under consideration do not exist. To exact it from the contractor, under these circumstances, would not be warranted by the law or justice of the case. I am therefore of the opinion that you are authorized to release him from that penalty.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

DISMISSAL OF OFFICER IN THE MARINE CORPS.

The President had, in 1861, power to dismiss from the service an officer of the Marine Corps.

Sembler that section 17, act of July 17, 1862, chap. 200, in so far as it authorized dismissals by the President from the military service, was declaratory only of long-established law, and that the force of the provision is found in the word "requested," by which it was intended to re-enforce strongly this power in the hands of the President at a great crisis.

DEPARTMENT OF JUSTICE,
January 8, 1878.

SIR: In answer to your inquiry, whether in 1861 the President of the United States had the authority to dismiss Lieutenant Tyler from the Marine Corps, I have the honor to say:

The power to dismiss officers from the military service of the United States, whether Army or Navy, was repeatedly and frequently exercised from the time of the adoption of the Constitution. Such power is not found in express terms in the Constitution; but according to the contemporaneous construction given to it, which was followed from that time to the time referred to, inclusive, it was repeatedly held by the

Dismissal of Officer in the Marine Corps.

Attorneys-General, when the question was submitted to them, or was incidentally necessary to be decided, that the authority thus to dismiss was possessed by the President. I refer to the opinion of Mr. Attorney-General Legaré, in the Randolph case, (4 Opin., 1,) that of Mr. Attorney-General Clifford, in Du Barry's case, (4 Opin., 603,) and those of Mr. Attorney-General Cushing, in Lansing's case, (6 Opin., 4,) and upon the Navy efficiency act, (8 Opin., 233-'8.) That the President had this power has not, as far as I know, been controverted by any adjudged case, or by the opinion of any Attorney-General, although it has been questioned by certain text-writers. I am of opinion, therefore, that as a question of law, upon both the expression of legal opinion and the practice of the Government, it must be deemed and taken to have been fully adjudged that the President possessed this power. I have not thought it necessary to recapitulate the reasons upon which these decisions have been made, as they are fully stated in the opinions referred to.

I do not think any doubt is thrown upon the previous possession of this power by the President by the fact that in 1862, July 17, Congress passed a law by which the President of the United States was authorized and requested to dismiss and discharge from the military service any officer, for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote, the public service. So far as that act gives authority to the President, it is simply declaratory of the long-established law. It is probable that the force of the act is to be found in the word "requested," by which it was intended to re-enforce strongly this power in the hands of the President at a great crisis of the State. Nor do I think that the subsequent acts, by which the power of the President to dismiss has been limited, have any tendency to show that he did not possess the power in 1861 to dismiss an officer upon his own responsibility. It is recognized by Attorney-General Browning, in Belger's case, (12 Opin., 421,) a case decided after the passage of the act of 1862, that in every instance where the question had arisen and been considered by the Attorney-General it had been held that the authority thus to dismiss was derived from the Constitution, and that it was exercised

Claim of James B. Hambleton.

in accordance with the settled construction of that instrument and the uniform practice of the Executive branch of the Government.

I am therefore of opinion that when the President of the United States dismissed Lieutenant Tyler from the service he had the constitutional right to do what he did, and that the officer in question ceased to be an officer in the service of the United States.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

CLAIM OF JAMES B. HAMBLETON.

Soon after the passage of the act of May 18, 1872, chap. 172, H. filed in the Treasury Department, under the fifth section of that act, a claim for the proceeds of 2,835 bales of cotton. In March, 1875, the then Secretary of the Treasury (Bristow) finally acted thereon, allowing the claimant a certain sum as the proceeds of 104 bales, and formally rejecting the remainder of the claim. Subsequently the claimant made application to the next succeeding Secretary (Morrill) for a reopening of the case, which was denied. Application for a reopening being again made, upon substantially the same grounds as before: *Held* that the decision heretofore made by the Treasury Department upon the claim cannot legally and with propriety be reopened by the present Secretary.

In the determination of questions, whether of law or fact, arising upon claims filed under said section, the judgment of the Secretary is not subject to direction or control; he acts independently, even of the Executive.

DEPARTMENT OF JUSTICE,

January 11, 1878.

SIR: Referring to your indorsement in the matter of the claim of James B. Hambleton, administrator of the estate of Benjamin Easley, deceased, for the proceeds of certain cotton, under the fifth section of the act of May 18, 1872, (17 Stat., 134,) I have the honor to reply:

This is a claim in behalf of said estate for the proceeds of 2,835 bales of cotton—the cotton, as is alleged, having been seized by the agents of the Government in the fall of 1865, and afterwards sold and the money paid into the Treasury.

An application for restitution of the proceeds of the same

Claim of James B. Hambleton.

cotton was presented to the Secretary of the Treasury in 1866, by Mrs. Martha L. Hambleton, one of the heirs of said Easley. This application was entertained and considered by the Secretary, but his action did not reach any final result, inasmuch as, while the matter was yet pending before him, Congress passed a law (the joint resolution of March 30, 1868) requiring all moneys received from the sales of captured and abandoned property to be covered into the Treasury, the effect of which was to take from the Secretary whatever power he might have previously had over the subject of the application.

Thereafter, until the enactment of the act of May 18, 1872, the Executive Department of the Government remained without authority to pass upon this class of claims. By the fifth section of that act the Secretary of the Treasury was "authorized and directed to pay to the lawful owners, or their legal representatives, of all cotton seized after the 30th of June, 1865, by the agents of the Government, unlawfully and in violation of their instructions, the net proceeds, without interest, of the sales of said cotton actually paid into the Treasury of the United States;" the section further declaring that the receipt of such proceeds is to be a full satisfaction of all claims against the United States for or on account of the seizure of the cotton, and that the foregoing provision is not to apply to any claim then pending before the Court of Claims, nor to any claim not filed in the Treasury Department within six months after the passage of said act.

The present claim was filed in the Treasury Department soon after the passage of the act of 1872; and though embracing the same cotton which was covered by the former application, it is nevertheless to be treated as a separate and distinct claim under the provisions of that act. In March, 1875, the then Secretary (Mr. Bristow) finally acted thereon, allowing the claimant the sum of \$3,549.56, as the proceeds of 104 bales, and formally rejecting the remainder of the claim.

The claimant now seeks a reopening and re-examination of the claim by the present Secretary; and his application therefor, with the accompanying papers, has been referred by the President to the Attorney-General for an opinion as to "the legality and propriety of reopening the case."

Claim of James E. Hamblton.

According to a well-settled rule of administrative law, often mentioned with approval by the Attorneys-General, the decision made by the former Secretary, in 1875, must be regarded as binding upon his successor, the present Secretary, unless it shall appear to be founded on a mistake of fact arising from error of calculation, or unless new and material evidence, since discovered, is produced, which, had the same been before the Department when the decision was made, would have led to a different result. Except under the circumstances just stated, viz, of mistake arising from error of calculation or the production of new and material evidence, the present Secretary would not be at liberty to disturb or review the decision of his predecessor. Therefore, under the rule adverted to, the legality and propriety of reopening the case depends, ultimately, upon whether either or both of those circumstances exist.

But the existence of either or both of those circumstances is matter of fact, which cannot be satisfactorily determined without an examination of the calculations heretofore made in the case and the basis thereof, and also a comparison of the evidence now produced with the evidence heretofore submitted and considered therein. The records, documents, and papers necessary to such an investigation are not before the Attorney-General. Besides, the subject-matter of the investigation, being one of *fact* merely, for that reason does not fall within his province, as his duty is limited to the examination of questions of law. Such investigation can only be *officially* made by or under the direction of the Secretary of the Treasury, upon whom the duty of executing the statute is devolved. And in this connection I may add that, as the statute devolves that duty upon the Secretary alone, no other officer can perform it without violation of the law. (See 1 Opin., 625.) In the determination of questions, whether of law or fact, arising upon claims filed thereunder, the judgment of the Secretary is not subject to direction or control; he acts independently, even of the Executive.

In the absence, then, of any other action in this matter by the Treasury Department than that which is above mentioned, it would follow that, if the claimant should make it appear to the satisfaction of the present Secretary that the decision of

Allowances for Revenue Stamps.

the former Secretary is founded upon a mistake arising from error of calculation, or should produce new evidence which, in the judgment of the present Secretary, affects the correctness of that decision, this would warrant the reopening of the case by the latter. But it is understood that after the decision of Secretary Bristow, in 1875, the claimant made application to his immediate successor, Mr. Morrill, for a reopening of the case upon substantially the same grounds and the same evidence which are now offered, and that the application was refused by Secretary Morrill. And it appears by the papers that the same application has since been before the present Secretary, who has also declined to reopen the case.

Thus the question of the legality and propriety of reopening the case would seem to be negatived by the adverse action already had upon the application to reopen. If the application stands (as it apparently does) upon no different grounds now than it did when it was considered and refused by Secretary Morrill, the action of the latter thereon should be deemed conclusive.

In this view of the subject, and upon the facts as now presented, I am of the opinion that the decision heretofore made upon this claim cannot legally and with propriety be reopened.

I am, sir, very respectfully,

CHAS. DEVENS.

The PRESIDENT.

ALLOWANCES FOR REVENUE STAMPS.

The limitation in section 3228 Rev. Stat., relative to claims for the refunding of internal-revenue taxes, has no application to claims for allowances for stamps under section 3426 Rev. Stat. Opinion of January 7, 1875, in 14 Opin., 513, overruled.

That limitation is intended to apply to the claims described in section 3220 Rev. Stat. only.

Documentary stamps presented under section 3426 Rev. Stat., above the denomination of two cents, which have been spoiled, or improperly or unnecessarily used, or are affixed to blank instruments, &c., and which are therefore not in the same condition as when issued, cannot be redeemed by the Commissioner of Internal Revenue, *unless* the person presenting them satisfactorily traces the history thereof, as provided by the *proviso* in the act of July 12, 1876, chap. 181.

Allowances for Revenue Stamps.

DEPARTMENT OF JUSTICE,

January 16, 1878.

SIR: Your letter of the 24th of November last, inclosing a communication addressed to you by the Commissioner of Internal Revenue, under date of the 21st of the same month, presents for my consideration the following question: Whether claims for the redemption of certain internal-revenue stamps, specified in that communication, are barred by the limitation prescribed by section 3228 of the Revised Statutes.

These claims are thus described by the Commissioner in his communication:

"First. Claims for the redemption of adhesive documentary, and proprietary stamps, which were issued and sold by the United States, through the internal-revenue office, or United States agents for the sale of such stamps, more than two years before their presentation for redemption under section 3426 of the Revised Statutes, but which have never been used, and are in the same condition as when sold and issued as aforesaid.

"Second. Claims for the redemption of stamps imprinted upon, or affixed to, blank instruments, and which were issued and sold by the United States as aforesaid more than two years prior to their presentation for redemption; such instruments having never been executed, and the stamps thereon being in the same condition as when issued and sold as aforesaid, excepting, in the case of affixed stamps, the difference of being affixed to the instruments referred to.

"Third. Claims for the redemption of stamps issued and sold by the United States as aforesaid, where such stamps were imprinted upon or affixed to instruments executed more than two years prior to the presentation of the stamps for redemption, but never issued; and where the stamps themselves are in the same condition—with the difference above mentioned as to affixed stamps—as when sold by the United States; railroad companies' bonds, for example, which have been signed by the proper officers of the corporation, but never issued.

"Fourth. Claims for the redemption of tobacco, snuff, cigar, and beer stamps, which were issued and sold by the

Allowances for Revenue Stamps.

United States, through the collectors of internal revenue, more than two years prior to their presentation, but which have never been used."

The question presented involves the general inquiry whether the provisions of section 3228 of the Revised Statutes apply to cases falling under the provisions of section 3426. After giving this subject careful examination, I find myself unable to adopt the view of the same subject taken by one of my predecessors, (see 14 Opin., 513,) in which the application of the former section to such cases is affirmed. Indeed, the result at which I arrive is just the opposite of that view.

The limitation imposed by section 3228 upon the presentation of claims to the Commissioner of Internal Revenue extends only to the presentation of such claims as are "for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected."

On turning to section 3220, it will be seen that authority is there given to the Commissioner to refund claims of precisely the same description as those mentioned in section 3228, viz, claims for "all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected." This authority is "subject to regulations prescribed by the Secretary of the Treasury."

Section 3426, on the other hand, makes provision for claims which are entirely different in character from those described in sections 3220 and 3228; and the Commissioner is himself authorized, from time to time, to make regulations for the purpose of carrying the provision into effect. The claims covered by this section are for allowances in respect of such internal-revenue stamps as "may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which through mistake may have been improperly or unnecessarily used, or where the rates or duties represented thereby have

Allowances for Revenue Stamps.

been paid in error or remitted." Such allowances are to be made "either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value, after deducting therefrom, in case of repayment, the sum of five per centum to the owner thereof," &c.

These claims for allowances under section 3426 have none of the elements which necessarily belong to the above-mentioned claims falling within section 3220. Thus the essential ingredients of the latter are, that there has been an *erroneous or illegal assessment or collection* of the tax to which the claim relates, or that it was *unjustly assessed*, or is *excessive in amount*, or has in some manner been *wrongfully collected*; while, in regard to the former, the essential ingredients are, that the stamps in respect of which an allowance is claimed, have been *spoiled, destroyed, or rendered useless or unfit for the purpose intended*, or that *the owner has no use for them*, or that *they have been improperly or unnecessarily used through mistake*, or that the rates or duties represented thereby have been *paid in error, or remitted*.

As the claims mentioned in section 3228 agree in description with those mentioned in section 3220, and are wholly contained in the latter section, and as it is manifest that these claims are all essentially different from those mentioned in section 3426, I deduce therefrom this conclusion: that the limitation in section 3228 is intended to apply to the claims described in section 3220, and not to the claims described in section 3426.

It is to be observed that by the *proviso* in the act of July 12, 1876, chap. 181, a restriction is placed upon the authority of the Commissioner to make allowances conferred by section 3426, in so far as such allowances relate to *documentary stamps* above the denomination of two cents. The language of the *proviso* is: "That from and after the passage of this act no allowance shall be made for documentary stamps, except those of the denomination of two cents, which, when presented to the Commissioner of Internal Revenue, are not found to be in the same condition as when issued by the Internal Revenue Department, or, if so required by the said Commissioner, when the person presenting the same cannot

Hot Springs Commission.

satisfactorily trace the history thereof from their issue to their presentation as aforesaid.

By reason of the prohibition contained in this provision, it is now necessary that all documentary stamps above the denomination of two cents, in order that the allowances may be made therefor under section 3426, shall be in the same condition when presented to the Commissioner as they were in when issued by the Internal Revenue department, or that the person presenting them, on being so required by the Commissioner, shall trace the history thereof, to the satisfaction of the latter, from their issue to their presentation. The last of these requirements is an alternative one, and comes into play only in cases where the stamps, at the time of their presentation, are not in the same condition as when issued. The result is, that documentary stamps presented for redemption, above the denomination of two cents, which have been spoiled, or improperly or unnecessarily used, or are affixed to blank instruments, &c., and which are consequently no longer in the same condition as when issued, cannot be redeemed by the Commissioner, *unless* the person by whom they are presented to the Commissioner satisfactorily traces the history thereof, as the statute provides.

Accordingly, in answer to the question submitted, I have the honor to reply that such of the claims for the redemption of internal-revenue stamps, specified in the communication of the Commissioner of Internal Revenue, as are within the provisions of section 3426 of the Revised Statutes, as modified by the act of July 12, 1876, are not affected by the limitation prescribed in section 3228 of the Revised Statutes.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

HOT SPRINGS COMMISSION.

The provision in the sixteenth section of the act of March 3, 1877, chap. 108, relating to the Hot Springs Commission, namely, "That said commissioners shall hold their offices for the period of one year from the date of appointment," fixes the duration of the term of the commission, and without further legislation it cannot be continued beyond the period indicated therein.

Hot Springs Commission.

DEPARTMENT OF JUSTICE,

January 17, 1878.

SIR: Referring to your indorsement of the 14th instant of the letter of the United States Hot Springs commissioners of date the 7th instant, and your inquiry whether the commission can, without further legislation, be continued beyond the term of one year from the date of the appointment of the commissioners, I have the honor to reply:

The act of March 3, 1877, (19 Stat., chap. 108, p. 377,) provides, in the sixteenth section, "That said commissioners shall hold their offices for the period of one year from the date of appointment."

I am of opinion that this is intended not only to fix the duration of the term of office of the commissioners, but also the duration of the term of the commission. The commission itself was for a temporary purpose, that of laying out the Hot Springs Reservation and settling the titles thereto; and it was undoubtedly anticipated by Congress that this was a work which might be performed within that period. The time for filing claims was fixed at six months after the date of the first meeting of the commissioners, and it was presumed that their adjudication could be made within the term provided as the period during which the commissioners should hold their offices.

In regard to statutes similar to the present, such as that establishing the "Southern Claims Commission," which is found in the second section of the act of March 3, 1871, (16 Stat., 524,) where it was provided that the commissioners should hold their offices for the term of two years, a legislative construction seems to have been given similar to that which I now suggest, and from time to time the duration of this commission has been extended. (17 Stat., 577; 19 Stat., 404.)

I am therefore of opinion that, in order that the Hot Springs Commission should be continued beyond the term of one year from the date of the appointment of the commissioners, further legislation is necessary.

Very respectfully, your obedient servant,

CHAS. DEVENS.

The PRESIDENT.

Court-Martial Proceedings.

COURT-MARTIAL PROCEEDINGS.

Where the accused was tried and convicted by a general court-martial on three distinct charges, one of which had been preferred by a member of the court, who testified as a witness in support of the same and afterwards sat upon the trial, no objection being made thereto by the accused, and the sentence of the court was duly confirmed: *Held* that the fact that a member of the court sat upon the trial after testifying did not render its proceedings invalid or make its sentence void and inoperative.

The objection, where it is not distinctly waived by the accused, goes to the *propriety* of the member sitting after he had testified, not to his *legal capacity* thus to sit; and, if seasonably made, it would afford good ground for disapproval of the proceedings by the reviewing officer, though not of itself sufficient to invalidate them.

DEPARTMENT OF JUSTICE,
January 19, 1878.

SIR: I have carefully considered the subject of your letter of December 20, 1877.

It appears from the papers accompanying it that First Lieut. Edward L. Keyes, Fifth Cavalry, was tried by a general court-martial, in February last, upon three distinct charges; that he was convicted on all of them, and sentenced to be dismissed from the service; that the proceedings, findings, and sentence were approved by the department commander who convened the court, and afterwards by the President, who directed the sentence to be executed, which was accordingly done; that Col. Wesley Merritt, who was one of the nine members of the court, preferred one of the charges, and was himself the sole witness in support of the second specification of that charge; that the accused was accorded his legal right of challenge of the members of the court before they were sworn, but made no objection to Colonel Merritt; who, after having given his testimony as a witness for the prosecution, continued to sit as a member of the court.

You ask my advice as to "whether the fact of Colonel Merritt having been a member of the court and a witness, after he had preferred a portion of the charges upon which the accused was convicted, involves such nullity of the proceedings as to render void and inoperative the sentence, notwithstanding its execution after approval and confirma-

Court-Martial Proceedings.

tion by the proper reviewing officer and the President of the United States."

There being no article of war or statute applicable to the case, the answer to your inquiry must depend upon the law peculiar to courts-martial and upon general principles of jurisprudence.

It is well settled that, however irregular, improper, or erroneous the proceedings in any case, civil or criminal, may have been, after they have once passed into final judgment by the decision of the ultimate revisory tribunal or authority, the judgment is as absolutely valid in law as if no error whatever had been committed, provided only the court had legal jurisdiction of the subject-matter and of the person of the accused; and no authority can be found for excluding proceedings of courts-martial from the operation of this rule. Unless, therefore, Colonel Merritt's position as the officer who preferred one of the charges, or his continuing to sit as a member of the court after testifying as a witness for the prosecution, deprived the court of jurisdiction, thus rendering its proceedings *coram non judice*, the sentence was and is legally valid.

It is well settled, as a general rule, that any mere personal objection to a judge may be waived by the accused; and that where there has been such waiver, the accused being aware of the objection, it cannot be assigned as ground of error, even in the appellate court. *A fortiori*, such personal objection, voluntarily waived, cannot avoid the proceedings after a final judgment. The only class of cases constituting an exception to this rule is where there is a disqualification of the person assuming to act as judge created by positive statute; as, for instance, where a judge within a certain degree of consanguinity with one of the parties, who has a personal interest in the controversy, is expressly prohibited from sitting. In these cases it has been held that a disregard of the statute was error, for which the judgment would be reversed by the appellate court, whether the objection had been waived by the accused or not.

It is not necessary to consider whether the disregard of a positive statute would suffice to render the proceedings void, since it is not claimed in the present case that any statutory

Employés in the Indian Service.

provision existed incapacitating Colonel Merritt to sit as a member of the court. His continuing to sit as such after testifying against the accused, thus being compelled to pass upon the weight of his own testimony, was objectionable; but the objection (unless it had been waived by the accused) goes to the *propriety* of his sitting under the circumstances, not to his *legal capacity* thus to sit. It is such an objection as, if seasonably made, might afford good ground for a disapproval of the proceedings by the reviewing officer; but I can find no authority for the position that it is of itself sufficient to invalidate them.

To the inquiry submitted by you I have therefore the honor to reply, that the fact that one of the charges upon which the accused was tried and convicted was preferred by a member of the court, who, having also testified as a witness in support of such charge, afterwards sat upon the trial, does not, in my opinion, render the proceedings themselves invalid, or make the sentence void and inoperative.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,
Secretary of War.

EMPLOYÉS IN THE INDIAN SERVICE.

The provision in the act of August 15, 1876, chap. 289, making appropriations for the Indian Department for the year ending June 30, 1877, namely, "That amounts now due employees for year ending June 30, 1876, may be paid out of unexpended balance of the incidental fund of said year," considered in connection with section 3682 Rev. Stat., and held that under that provision amounts due for clerical or official services in the Indian service for the year ending June 30, 1876, may be paid out of the unexpended balance of the incidental fund of the Indian service for the same year.

The term "employees," as used in the same provision, was meant to include all those who performed services in any capacity in the Indian service during the year ending June 30, 1876, whose employment was authorized by law, and whose compensation remained unpaid at the date of the act of August 15, 1876.

DEPARTMENT OF JUSTICE,
January 21, 1878.

SIR: By your letter of the 10th instant, referring to section 3682 of the Revised Statutes, which provides that "no moneys

EMPLOYÉS IN THE INDIAN SERVICE.

appropriated for contingent, incidental, or miscellaneous purposes shall be expended or paid for official or clerical compensation," and also to the act of August 15, 1876, making appropriations for the current and contingent expenses of the Indian Department, &c., which provides (see 19 Stat., 198) "that amounts now due employees for year ending June 30, 1876, may be paid out of unexpended balance of the incidental fund of that year," my opinion is requested upon the following question: "Whether the latter act authorizes the accounting officers to pay clerical or official services out of the unexpended balance of the incidental fund of the fiscal year 1876?"

The term "employees," in the provision quoted from the act of August 15, 1876, must be taken to mean only employés in the Indian service, and the term "incidental fund," in the same provision, to mean the incidental fund of the Indian service. That provision, then, authorizes the application of the unexpended balance of the incidental fund of the Indian service for the year ending June 30, 1876, to the payment of amounts due employés in the Indian service for that year.

The question submitted turns upon the point whether clerical or official compensation is included in the words "amounts due *employees*." If this compensation is covered by these words, the effect of the act of August 15, 1876, is to withdraw or except from the operation of section 3682 the payment of such compensation in the Indian service for the year ending June 30, 1876, out of the unexpended balance of the incidental fund of that service for the same year. The term "employee" is very comprehensive, and it has been used by Congress as a general term, including officers and clerks as well as messengers, laborers, &c. Thus, in the act of July 28, 1866, chap. 296, section 18, the latter reads: "That there be allowed and paid to the officers, clerks, committee clerks, messengers, and all *other employees*," &c. In the provision above quoted from the act of 1876 there is nothing to indicate that the term is meant to be understood in a less comprehensive sense than that which it bears in the section of the act of 1866 just cited. I think it was intended to include all those who performed services in any capacity in the Indian service, whether as officers, clerks, artisans, or mere laborers, during the year ending June 30, 1876, whose employment was authorized by

Power to Mitigate Fine, etc.

law, and whose compensation remained unpaid at the date of the act of August 15, 1876. This act presupposes the existence of a deficiency, arising from the exhaustion of the regular appropriation applicable to such services, or from the want of an appropriation applicable thereto, and aims to provide therefor by authorizing payments of amounts due for the services mentioned to be made out of the unexpended balance of the incidental fund, which, otherwise, would be unavailable for that purpose (so far, at least, as official and clerical services are concerned) by reason of the prohibition contained in section 3682. But, as already intimated, it must be construed to authorize payments to be made out of that fund for the services of those only whose employment in the Indian service during the year ending June 30, 1876, was at the time warranted by law.

I am therefore of the opinion that, under the act of August 15, 1876, amounts due for "clerical or official services" in the Indian service for the year ending June 30, 1876, (provided the employment of the persons by whom such services were performed was authorized by law,) may be paid out of the unexpended balance of the incidental fund of the Indian service for the same year.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

POWER TO MITIGATE FINE, ETC.

By section 4751 Rev. Stat., the Secretary of the Navy has power to mitigate any fine, penalty, or forfeiture incurred under the provisions of the sections designated therein; and this power may be exercised by him as well where the proceedings, civil or criminal, have not been instituted with his knowledge and by his direction as where they have been thus instituted.

DEPARTMENT OF JUSTICE,
January 23, 1878.

SIR: Referring to your letter of the 23d of November last, in which you submit a question relative to the authority of the Secretary of the Navy to mitigate fines, &c., under section 4751 of the Revised Statutes, I have the honor to reply:

Power to Mitigate Fine, etc.

By that section the Secretary of the Navy is "authorized to mitigate, in whole or in part, on such terms and conditions as he deems proper, by an order in writing, *any fine, penalty, or forfeiture* incurred under the provisions of sections 2461, 2462, and 2463 of the Revised Statutes. The same section also provides that "all penalties and forfeitures" so incurred shall be "sued for, recovered," &c., under his directions. But section 2463 makes it the duty of all officers of the customs, and of the land officers within certain States designated therein, "to cause prosecutions to be seasonably instituted against all persons known to be guilty of depredations on, or injuries to, the live-oak growing on the public lands;" the depredations here mentioned including those specifically set forth in section 2461. And the acts described in the latter section being indictable offenses, (see the case in 9 How. cited below,) criminal proceedings against persons charged therewith may be put in motion without the previous direction of the Secretary of the Navy or any action on the part of the customs or land officers. Thus the institution of proceedings (at least criminal proceedings) under the sections named in section 4751 may take place without the direction or even knowledge of the Secretary of the Navy; and the question submitted is, Whether the authority to mitigate fines, &c., conferred on him by that section, can be exercised where the proceedings were not instituted with his knowledge and by his direction?

Formerly, by the third section of the act of March 2, 1831, chap. 66, (the provisions of which act are nearly all re-enacted in said sections 2461, 2462, and 4751,) power to mitigate fines, penalties, or forfeitures, such as are referred to in section 4751, was conferred on the commissioners of the Navy pension fund, consisting of the Secretary of the Navy, Secretary of the Treasury, and Secretary of War. This power was wholly independent of the authority to give directions touching the institution of civil proceedings, or to put in motion criminal proceedings, under the same act. This act contained a provision (similar to the one in section 4751, already referred to) that "all penalties and forfeitures" incurred thereunder should be "sued for, recovered," &c., under the directions of the Secretary of the Navy; but as certain acts therein mentioned

Defaced or Destroyed Coupons.

were punishable by fine and imprisonment, and constituted indictable offenses, (*United States vs. Briggs*, 9 How., 351,) the indictment of persons charged therewith might properly be had, and criminal proceedings go on, without such directions. In either case, however, the commissioners of the Navy pension fund were invested with power to mitigate the fine imposed or the forfeiture or penalty recovered. The functions of those commissioners ceased under the act of July 10, 1832, chap. 194, and all their powers and duties were by the fifth section of the same act transferred to the Secretary of the Navy. Accordingly, the latter officer became clothed with the same independent power to mitigate any fine, penalty, or forfeiture incurred under the act of March 2, 1831, which previously belonged to the said commissioners.

Section 4751 but reproduces the law as it then stood. It places the Secretary in possession of power to mitigate as full and ample in extent as it existed in the commissioners under the act of March 2, 1831, and as it afterwards existed in him under the act of July 10, 1832. The power, in my opinion, extends to any fine, penalty, or forfeiture incurred under the provisions of the sections designated in section 4751, and may be exercised by the Secretary as well where the proceedings, civil or criminal, have not been instituted with his knowledge and by his direction as where they have.

To the question submitted I therefore return an affirmative answer.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

DEFACED OR DESTROYED COUPONS.

Section 3702 Rev. Stat. does not authorize relief to be given in the case of coupons destroyed or defaced after their separation from the bonds to which they were attached. Its provisions apply solely to destroyed or defaced interest-bearing bonds.

Coupons, whilst remaining attached to the bonds with which they were issued, are to be regarded as parts thereof, and, if then defaced or destroyed, the case would fall within the section as one of partial defacement or destruction of the bond. But they lose that character after being detached.

Defaced or Destroyed Coupons.

DEPARTMENT OF JUSTICE,

January 29, 1878.

SIR: Referring to your letter of the 1st ultimo, in which is presented for my consideration the question, whether section 3702 of the Revised Statutes authorizes the Secretary of the Treasury to give relief in cases where coupons, previously detached from the bonds, have been destroyed, I have the honor to reply:

The provisions of that section do not, in my opinion, extend to coupons which have been destroyed or defaced after their separation from the bonds to which they were attached.

By the first clause of the section, in case of the total or partial destruction of an "interest-bearing bond of the United States," or in case such a bond has been so defaced as to impair its value to the owner, the Secretary of the Treasury is authorized, under certain conditions, to "issue a duplicate thereof," &c. The language of this clause limits the authority thereby conferred to the mere issuing of duplicate bonds in the cases mentioned.

So long as coupons remain attached to the bonds with which they were issued, they must be deemed to constitute parts thereof; and therefore if one or more coupons, whilst attached to a bond of the above description, become destroyed or defaced, this would be a case of partial destruction or defacement of the bond, and fall within the statute. But after the severance of the coupons from the bonds they can no longer be regarded as forming parts thereof. They then cease to be incidents even of the bonds, and become in fact independent claims, possessing the essential attributes of commercial paper. (*Clark vs. Iowa City*, 20 Wall., 589.)

Accordingly, should coupons, after having been detached by the holder of the bonds, be transferred to another person, in whose hands they afterwards become destroyed or defaced, the latter would clearly have no right to any relief which the Secretary is by the said clause authorized to give, since the authority of the Secretary, except in cases falling within the second or last clause of section 3702, is confined to the issuing of duplicate bonds, which the detached cou-

Deduction for Non-Performance of Mail Service.

pions thus destroyed or defaced are not. Yet the result would be the same should such detached coupons not be transferred by the holder of the bonds, but become destroyed or defaced while both they and the bonds are still owned by him; as it is by the severance of the coupons from the bonds that the former cease to be parts of the latter, not by any change of ownership which may subsequently ensue.

By the second or last clause, to which I have above adverted, when any *such destroyed or defaced bond* belongs to a class or series that has been or may, before the application, be called in for redemption, in this case the Secretary is authorized, instead of issuing a duplicate thereof, to pay the bond, with such interest as would have been paid if it had been presented in accordance with the call. This clause is not more comprehensive than the other, but has precisely the same scope in respect to the subject-matter of relief; in other words, it extends solely to destroyed or defaced interest-bearing *bonds*. The mode of relief only is varied thereby in cases where such bonds are of a class or series already called in for redemption.

While the provisions of section 3702 were enacted with a view to enable persons who may sustain loss by the destruction or damage of Government securities to obtain relief without resorting to Congress for special legislation, the authority conferred upon the Secretary of the Treasury by that section to afford relief must nevertheless be exercised in strict conformity with those provisions. He is not at liberty to give relief, in either of the modes provided, in cases which do not fairly come within the terms of the statute.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN

Secretary of the Treasury.

DEDUCTION FOR NON-PERFORMANCE OF MAIL SERVICE.

During the railroad troubles (labor strikes) of 1877, the Michigan Central Railroad Company (with which there was a written contract for mail service, containing special provision as to forfeiture of pay) and the Cleveland and Pittsburgh Railroad Company (with which there was no contract in writing, but which was engaged in the performance of

Deduction for Non-Performance of Mail Service.

"recognized service" in the conveyance of the mail) failed to transport the mail over their respective roads for a day or two, on account of which deductions were made from their pay: *Held* that it was competent to the Postmaster-General to make the deductions in both cases.

DEPARTMENT OF JUSTICE,
January 30, 1878.

SIR: Your letters of November 26 and 10th instant, relating to the right to deduct from the postal earnings of the Michigan Central Railroad Company and of the Cleveland and Pittsburgh Railroad Company, for failure regularly to deliver the mails, though they state facts as to each company differing in some particulars, are believed to depend substantially upon the same general legal principles.

During the railroad troubles of last summer these corporations were for a day or two prevented from running their trains; consequently, on the 23d and 24th of July, the Cleveland and Pittsburgh Railroad Company omitted to carry any mail over their road, and there was a like failure on the 26th of that month over part of the line of the Michigan Central Railroad Company, and for this cause trifling deductions were made at the end of the quarter from their pay. The right so to do is now questioned.

The Revised Statutes, section 3962, provides: "The Postmaster-General may make deductions from the pay of contractors for failure to perform service according to contract and impose fines upon them for other delinquencies. He may deduct the price of the trip *in all cases* where the trip is not performed, and not exceeding three times the price if the failure be occasioned by the fault of the contractor *or carrier*."

There was a written contract for railroad mail service with the Michigan Central Railroad Company, one clause of which stipulated, "That in every case of failure to perform the trip (unless it is shown that the same was not caused by misconduct, neglect, or want of proper skill) there may be a forfeiture of the pay for the trip, and a failure to arrive at the end of the route, so as to lose the connection with a depending mail, shall be considered as equal to a whole trip lost, unless the detention or delay be the result of unavoidable causes."

With the Cleveland and Pittsburgh Railroad Company there was no written contract, but it was doing what is known

Case of Lieut. George M. Welles.

to the Post-Office Department as "recognized service" in the conveyance of the mail, being compensated therefor at the rates prescribed by the Revised Statutes, section 3998.

The before-mentioned section (3962) gives authority to the Postmaster-General to make the deduction he did from the pay of the Cleveland and Pittsburgh Railroad Company, even if the "may" there used is taken as permissive, and not construed imperatively, though imposing a public official duty.

If the cited clause of the contract with the Michigan Central Railroad Company can affect this statutory provision, still it is left to the Postmaster-General to determine as a fact the question of neglect, and whether or not the strike was a sufficient excuse for failure to make the trip, &c.

I am therefore of opinion that it was competent for the Postmaster-General to make the deductions complained of from the earnings of each of these corporations.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

CASE OF LIEUT. GEORGE M. WELLES.

A board of officers, duly constituted, was convened by an order of the Secretary of the Navy, dated July 30, 1874, to inquire into and determine whether W., a lieutenant of Marines, was incapacitated for active service. The board found him so incapacitated, and that the cause of his incapacity was not an incident of the service. On submission of the proceedings and finding of the board to the President, he, under date of August 18, 1874, indorsed thereon: "I concur in opinion with the retiring board in the case of W. Let him be retired on furlough pay." Held (1) that the action of the President amounted to an approval of the finding of the board, and to a retirement of W. from "active service," within section 1252 Rev. Stat., and that he was retired in conformity with the law applicable to officers of the Marine Corps; (2) that W. thereby became entitled to receive pay according to the rate established by law for retired officers of the Marine Corps, (viz, 75 per centum of the pay of the actual rank held by him at date of retirement,) notwithstanding a different rate of pay (viz, furlough pay) was named by the President in retiring him.

Case of Lieut. George M. Welles.

DEPARTMENT OF JUSTICE,

January 31, 1878.

SIR: Your letter of the 19th instant, in regard to the case of First Lieut. George M. Welles, of the United States Marine Corps, presents for my consideration the following questions:

"1st. Whether Lieutenant Welles was retired in conformity with the provisions of the law for the retirement of officers of the Marine Corps?

"2d. If so retired, whether he is entitled, under section 1274 of the Revised Statutes, to 75 per centum of the pay of his rank on the active list, or simply to the furlough pay which he has been receiving?"

It appears from your letter that a retiring board was convened by an order of the Secretary of the Navy, dated July 30, 1874, to inquire into and determine whether Lieutenant Welles is incapacitated for active service; that the board was composed of one major and two captains of the Marine Corps and two surgeons of the Navy, with a first lieutenant of the said corps for recorder of the board; and that the finding of the board was, "That First Lieut. George M. Welles, United States Marine Corps, is incapacitated for active service; that said incapacity is caused by partial loss of vision; and that said cause was not an incident of the service."

The record of the proceedings and finding of the board was submitted to the President, who made the following indorsement thereon:

"EXECUTIVE MANSION,

"August 18, 1874.

"I concur in opinion with the retiring board in the case of First Lieut. George M. Welles. Let him be retired on furlough pay.

"U. S. GRANT."

By a letter from the then Acting Secretary of the Navy, dated August 19, 1874, Lieutenant Welles was advised of the finding of the board and of the action of the President, and

Case of Lieut. George M. Welles.

was informed that he would be considered as retired on furlough pay from that date.

At the period of the order of the Secretary of the Navy, and of the proceedings of the board, and of the action of the President, the retirement of officers of the Marine Corps was governed by sections 1622 and 1623 of the Revised Statutes. The former section requires officers of that corps to be retired in like cases, and in the same manner, and "with the same relative conditions in all respects," as officers of the Army are retired, except as is otherwise provided in the latter section.

On examination, it appears that the law touching the selection, number, and composition of the board has been complied with, and that the directions of the law have been followed by the board in its finding.

By section 1252 of the Revised Statutes, which is applicable to the case under consideration, it is declared that "when the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine." Officers "wholly retired from the service" are, by section 1275, entitled to receive, upon their retirement, one year's pay and allowances; while by section 1274 officers "retired from active service" become entitled thereafter to receive 75 per centum of the pay of the rank upon which they are retired, which rank must be the "actual rank" held by them at the date of retirement. (See section 1254.)

Thus, for officers of the Marine Corps who are retired from active service, as for officers of the Army who are so retired, there is but one rate of pay established by law, namely, 75 per centum of the pay of the rank upon which they are retired; and, I hardly need add, it is not competent to the President to place these retired officers on a different rate of pay than that which the law has fixed.

The inquiry now arises, whether the action of the President in the present case amounts to an approval of the finding of the board and to a retirement of Lieutenant Welles from active service. If so, that officer was retired agreeably to

Case of Lieut. George M. Welles.

the provisions of law regulating the retirement of officers of the Marine Corps, and is entitled to receive pay according to the rate established by law for retired officers of the Marine Corps, notwithstanding a different rate of pay was named by the President in retiring him.

The first sentence of the indorsement of the President upon the record of the proceedings of the board admits of no other construction than that it was meant to express his approval of the finding of the board. Having thus approved the finding of the board, it rested entirely in his discretion whether Lieutenant Welles should be retired from active service or be wholly retired from the service; but it was necessary that one or the other be done, as the law is imperative that, when the decision of the board is approved by the President, the officer "shall be retired," &c. The direction given in the last sentence of the indorsement clearly indicates that it was the determination of the President that Lieutenant Welles be retired from active service simply. The compensation of an officer thus retired being fixed by statute, and not left to be determined by the President, in so far as that direction limits the pay of Lieutenant Welles on the retired list it must be treated as of no effect.

It may well be that the indorsement was prepared inadvertently; it being supposed that the law which applies to officers of the Navy (who may be retired upon *furlough* pay, if the reason for their retirement was not an incident of the service) applies to officers of the Marine Corps. (Rev. Stats., sections 1454, 1593.) Such, however, is not the case. For the Marine Corps different legislation is provided.

In answer to the questions submitted by you, I have, therefore, the honor to reply that, in my opinion, Lieutenant Welles was retired in conformity with the law providing for the retirement of officers of the Marine Corps, and that he is entitled to receive 75 per centum of the pay of the rank upon which he was retired, *i. e.*, of the actual rank held by him at the date of retirement.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. R. W. THOMPSON,

Secretary of the Navy.

Case of Paymaster R. B. Rodney.

CASE OF PAYMASTER R. B. RODNEY.

Upon examination of the finding of the retiring board in the case of Paymaster Rodney, of the Navy, the proceedings in which took place in June, 1871, and were approved by the President August 31, 1871, who at the same time directed that Paymaster R. be retired on furlough pay: *Advised* that the board found the latter incapacitated upon the sole ground that his peculiar mental temperament unfitted him for active service in the Navy; that his consequent retirement was not "because of misconduct;" and that there is no legal ground for setting aside the proceedings of the retiring board and revoking the order of retirement in his case.

Whether the finding of the board was warranted by the evidence adduced cannot now be inquired into, as no power of review over its proceedings exists.

DEPARTMENT OF JUSTICE,
February 8, 1878.

SIR: Your letter of the 21st ultimo, in relation to the case of Paymaster R. B. Rodney, of the Navy, presents for my consideration the following question: Whether there be legal ground and authority for setting aside the proceedings of the retiring board and revoking the order of retirement in that case.

It appears that the proceedings in question took place in June, 1871, and that on the 31st of August, 1871, they were approved by the President, who at the same time directed that Paymaster Rodney be retired on furlough pay.

The law under which these proceedings were had is contained in section 23 of the act of August 3, 1861, chap. 42. By this section it is provided that whenever, in the judgment of the President, an officer of the Navy shall be "in any way" incapacitated from performing the duties of his office, the President shall, at his discretion, direct the Secretary of the Navy to refer the case of such officer to a board, &c.; that the board, whenever it finds an officer incapacitated for active service, will report whether, in its judgment, the incapacity results from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure therein, or from any other incident of service, &c.; and that, where the disability or incompetency proceeds "from other causes," and the President concurs in opinion with the board,

Case of Paymaster R. B. Rodney.

the officer may be retired on furlough pay, or be wholly retired from the service with one year's pay, at the discretion of the President.

But by the sixth section of the act of July 15, 1870, chap. 295, which was in force during the period mentioned, it is declared "that no officer of the Navy shall, because of misconduct, be placed on the retired list, but he shall be brought to trial by court-martial for such misconduct." And it is understood that the sole objection urged by Paymaster Rodney against the validity of his retirement is, that the same was in violation of this enactment.

In considering the question submitted by you, I shall accordingly confine myself to an examination of the single point involved in that objection, namely, whether Paymaster Rodney was placed on the retired list "because of misconduct."

The finding or determination of the board in his case reads as follows:

"1st. That in their judgment the physical condition of Paymaster Robert Burton Rodney is good, but that his peculiar mental temperament incapacitates him from active service in the Navy of the United States.

"2d. That said temperament of Paymaster Rodney, according to the evidence laid before the board, develops itself in an entire disregard of the laws, regulations, customs, and proprieties of the service, and has been manifested persistently while said Rodney was attached to the North Atlantic fleet, in language and conduct to the subversion of good order and discipline, and proceeds, in the opinion of the board, in part from fanaticism and in part from the groundless belief that he is a victim of persecution.

"In the judgment of the board the incapacity of Paymaster Robert Burton Rodney results neither from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure, or from any other incident of service.

"The board are impressed with the belief that the tendency to misconduct under which Mr. Rodney labors will be revived whenever his association with the Navy shall be renewed.

Case of Paymaster B. B. Rodney.

"The board are unable to trace the mental incompetency of Paymaster Rodney to any special cause, but believe it to be inherent, and therefore can only recommend that he be removed from the active list of the officers of the Navy."

The above finding of the board does not, as I conceive, ground the incapacity of Paymaster Rodney for active service upon *misconduct*, but upon the *peculiarity of his mental temperament*. It is true, the board, referring to this temperament, states that it "develops itself in an entire disregard of the laws, regulations, customs, and proprieties of the service, and has been manifested persistently while said Rodney was attached to the North Atlantic fleet, in language and conduct to the subversion of good order and discipline;" and further on the board speaks of him as laboring under a "tendency to misconduct." But this statement was obviously intended to describe the *mental condition* of the officer. Although it ascribes to him, generally, an "entire disregard of the laws, regulations, customs, and proprieties of the service," and also, within a certain period, "language and conduct to the subversion of good order and discipline," yet such language and conduct, together with the disregard of the laws and usages and proprieties of the service, appear to be assigned only as facts and circumstances indicative of that condition. We cannot well affirm that these facts and circumstances constitute the real ground upon which the board adjudged the officer incapacitated, when the board itself, in their finding, expressly places his incapacity upon a different ground, namely, a "peculiar mental temperament" that unfits him for active service, and when the facts and circumstances alluded to are apparently set forth by the board only as outward manifestations of such temperament. This peculiarity of temperament is described in the last paragraph of the finding as "mental incompetency," which the board there says it is unable to trace to any special cause, but believes the same to be inherent.

The President having concurred in the finding of the board, and thereupon directed the retirement of Paymaster Rodney from active service, the latter must be deemed to have been placed on the retired list, not because of misconduct, but because of incapacity for active service arising from

Appointment of Assistant Appraisers at New York.

the peculiarity of his mental temperament or inherent mental incompetency, as found by the board. Whether this finding of the board was warranted by the evidence adduced is an inquiry that cannot now be gone into; as no power of review over the proceedings of the retiring board exists by law, where its finding has been once approved by the President and his "orders in the case" executed. The result is, that the objection urged by Paymaster Rodney cannot be considered in connection with any part of the record of the proceedings of the board except the finding, and this, in my view, affords no foundation for such objection.

The forgoing considerations bring me to the following conclusion, which I have the honor to submit in reply to the question presented by you, namely, that there is no legal ground for setting aside the proceedings of the retiring board and revoking the order of retirement in the case of Paymaster R. B. Rodney.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. R. W. THOMPSON,

Secretary of the Navy.

APPOINTMENT OF ASSISTANT APPRAISERS AT NEW YORK.

The provision in section 2 of the act of July 27, 1866, chap. 284, giving the Secretary of the Treasury authority to appoint assistant appraisers for the port of New York, is impliedly repealed by section 2536 Rev. Stat., under which latter section the appointment of those officers is in future to be made by the President with the advice and consent of the Senate.

In the absence of a statutory provision to the contrary, the appointment of any officer of the United States devolves upon the President with the concurrence of the Senate.

DEPARTMENT OF JUSTICE,

February 14, 1878.

SIR: Referring to our conversation of yesterday and your oral inquiry whether the President or the Secretary of the Treasury has now the right to appoint the ten assistant appraisers for the port of New York provided by the second clause of section 2536 of the Revised Statutes, I have the honor to say:

Bounty Land Claims.

By the act of July 27, 1866, chap. 284, sec. 2, (14 Stat., 302,) it was provided that ten assistant appraisers for the port of New York should be appointed by the Secretary of the Treasury. In the revision of the statutes it is simply provided in the clause in question that there shall be such appraisers, and in the same clause are included officers who have always been appointed by the President. Where there is no express enactment to the contrary, the appointment of any officer of the United States belongs to the President, by and with the advice and consent of the Senate. (See opinion of Attorney-General Cushing, 6 Opin., 1.) When, therefore, in the revision the provision is omitted that these appraisers may be appointed by the Secretary of the Treasury, and their appointment is simply provided for, the general rule of law takes effect, that the appointment is to be made by the President, and the revision must be construed *pro tanto* as a repeal of the second section of the act of July 27, 1866. It is provided in the Revised Statutes themselves, section 5596, that all acts of Congress passed prior to the 1st day of December, 1873, "any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

In answer to your inquiry, I have therefore the honor to say, that since the revision of the statutes the appointments in question are to be made by the President, and require the confirmation of the Senate.

I ought, perhaps, to add that the revision would not operate to affect the tenure of office of any incumbent who had theretofore been lawfully appointed by the Secretary of the Treasury.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

BOUNTY LAND CLAIMS.

The prohibition contained in the joint resolution of March 2, 1867, (the provisions of which are embodied in section 3480 Rev. Stat.,) is applicable to claims for bounty land; the intent of Congress being to include therein all manner of claims and demands—not only pecuniary, but other claims as well.

Bounty Land Claims.

DEPARTMENT OF JUSTICE,

February 20, 1878.

SIR: Referring to your indorsement upon certain papers sent to me by your direction on the 25th ultimo, the inquiry involved is whether the provisions of the joint resolution of March 2, 1867, (now embodied in section 3480 of the Revised Statutes,) apply to claims for bounty land. In reply, I have the honor to state:

By that enactment it is made unlawful "for any officer to pay any account, claim, or demand against the United States which accrued or existed prior to the 13th day of April, 1861, in favor of any person who promoted, encouraged, or in any manner sustained the late rebellion, or in favor of any person who during such rebellion was not known to be opposed thereto, and distinctly in favor of its suppression," &c.

The answer to the above inquiry depends upon the construction to be put upon the terms "pay any account, claim, or demand," as used in the statute.

It is suggested in one of the papers mentioned that by reason of the employment of the word "pay" those terms must be interpreted to relate to claims upon the Government which are of a pecuniary nature only. That word is, indeed, more commonly used to express the discharge of a pecuniary liability, but it may be appropriately used to express the discharge of any obligation, whether this involves delivery of money, performance of service, or transfer of property. Its meaning, in legal contemplation, is the same as "satisfy," and in this sense it is as applicable to claims for land warrants as to claims upon the Treasury.

Accordingly, the terms adverted to do not of themselves seem to require that a restricted interpretation, such as is suggested, be given them. If, in connection with those terms, the grounds for prohibiting payment or satisfaction of any claim or demand (which sufficiently appear in the body of the statute itself) are considered, it can hardly admit of doubt that the intent of Congress was to include in the prohibition all manner of claims and demands—not only pecuniary, but other claims as well. When Congress distinctly legislated

Savings Banks—Taxation on Deposits.

that accounts, &c., where a consideration must have been received by the United States, should not be paid when held by a particular class of persons, it can hardly be supposed that claims which were gratuities and bounties only should under such circumstances have been intended to be satisfied.

I am therefore of the opinion that the joint resolution of March 2, 1867, (section 3480, Revised Statutes,) applies to claims for bounty land.

I am, sir, very respectfully,

CHAS. DEVENS.

The PRESIDENT.

SAVINGS BANKS—TAXATION ON DEPOSITS.

Where certain savings banks, without capital stock, received daily deposits from others than their regular depositors, under agreement that no interest should be allowed thereon, but that they might be checked out without previous notice, and that the checks should be paid by drafts on Boston when so required, to meet which drafts a fund was kept on deposit in a Boston bank, upon which interest was allowed the savings banks at the rate of four per centum per annum: *Held* that these savings banks are not entitled to exemption from taxation on said deposits under section 9 of the act of July 13, 1866, chap. 184, (nor under section 3408 Rev. Stat.)

DEPARTMENT OF JUSTICE,

March 2, 1878.

SIR: Consideration of the question submitted by your letter of November 13, 1877, has been postponed to give to parties interested the hearing which they desired.

Certain savings banks in New Hampshire, having no capital stock, in addition to the sums received from their regular depositors for investment took the daily deposits of merchants and other business men, under an express agreement that no interest should be paid thereon, but that they might be checked out as from ordinary national banks without previous notice, and should be paid by draft on Boston when so required. To meet such drafts, a fund, much smaller in amount than these deposits, was kept in some Boston bank, which allowed therefor an interest of four per cent. per

Savings Banks—Taxation on Deposits.

annum. These deposits were termed "*special* deposits," and their reception was provided for by the by-laws of the savings banks.

The act of June 30, 1864, chap. 173, sec. 110, (13 Stats., 277-'8,) imposed a duty upon deposits "with any person, bank, association, company or corporation engaged in the business of banking;" excepting "any savings bank having no capital stock, and whose business is confined to receiving deposits and loaning the same on interest for the benefit of the depositors only, and which do no other business of banking." By the act of March 3, 1865, chap. 78, sec. 1, (13 Stats., 479,) this clause was stricken out. The act of July 13, 1866, chap. 184, sec. 9, (14 Stats., 137,) provided an exemption from taxation of certain "deposits in associations or companies known as provident institutions, savings banks, savings funds, or savings institutions, having no capital stock, and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company." The Revised Statutes, section 3408, page 673, preserves this phraseology.

The question presented is succinctly stated by the Commissioner of Internal Revenue, in his letter to you, to be this: "Were these banks entitled to the exemptions specified in either of the statutes or sections above named?"

Not being at liberty to regard the equitable considerations pressed in argument, I am compelled to say that they are not by law entitled to the benefit of these exemptions. The special deposits before mentioned were not received "*to be loaned or invested* for the sole benefit of the parties making *such* deposits." It was intended that a profit or compensation should accrue to the association or company. Corporations entering upon such transactions were doing an "other business of banking than that which alone was to entitle them to exemption."

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

School Lands in California—Indemnity.

SCHOOL LANDS IN CALIFORNIA—INDEMNITY.

The words "reserved for public uses," as employed in section 7 of the act of March 3, 1853, chap. 145, and section 6 of the act of July 23, 1866, chap. 219, were not meant to apply to lands which passed to the State of California under the swamp-land act of September 28, 1850. That State is not entitled to indemnity, under those enactments, for school sections falling within the swamp-land grant.

DEPARTMENT OF JUSTICE,

March 4, 1878.

SIR: By your letter of the 1st of October last, directing my attention to the swamp-land-grant act of September 28, 1850, to the sixth and seventh sections of the act of March 3, 1853, entitled "An act to provide for the survey of the public lands in California," &c., and to the sixth section of the act of July 23, 1866, entitled "An act to quiet land titles in California," I am informed that an application is pending in your Department, on behalf of the State of California, asking that certain lands be listed to that State "as indemnity school lands for sixteenth and thirty-sixth sections, for which she has already received patents as swamp lands under the act of September 28, 1850," and that this application has given rise to the two following questions, on which you request my opinion, namely:

"First. Did the grant made by the act of September 28, 1850, create a reservation for public uses?

"Second. If so, was it such a reservation as is contemplated by the acts of March 3, 1853, and July 23, 1866, aforesaid, for which the State is entitled to indemnity for any sixteenth or thirty-sixth sections of land lost thereby; or should the reservations for public uses therein mentioned be held to include only reservations which had been created and established under the laws of the United States for governmental purposes?"

In considering these questions, I will vary their order and begin with an examination of the sixth section of the act of July 23, 1866, which declares that the act of March 3, 1853, "shall be construed as giving the State of California the right to select for school purposes other lands in lieu of such

School Lands in California—Indemnity.

sixteenth and thirty-sixth sections as were settled upon prior to survey, *reserved for public uses*, covered by grants made under Spanish or Mexican authority, or by other private claims, or where such sections would be so covered if the lines of the public surveys were extended over such lands, which shall be determined whenever township lines shall have been extended over such land, and in case of Spanish or Mexican grants, when the final survey of such grants shall have been made." * * *

The inquiry is, whether the words "reserved for public uses" in that section were meant to include lands granted to the State of California by the swamp-land act of September 28, 1850.

It is to be observed that with all the other States to which both school and swamp lands have been granted by Congress the school-land grants are prior in date to the swamp-land grants. By reason of the priority of the former grants, the school sections in these States, where they happen to fall within a swamp, pass to the State as *school* land, not as swamp; and I am not aware of the existence of any general provision of law under which such State is entitled to indemnity for so much of the swamp land within its borders as has been previously granted thereto for school purposes. Accordingly, where the two grants thus lap, these States sustain an apparent diminution *pro tanto* in the appropriation of lands made for the purposes named in the swamp grant.

With the State of California, on the other hand, the swamp-land grant being prior in date to the school-land grant, where a school section is of a swampy character it goes to that State as *swamp* land, not as school. Hence, if the indemnity provision of the act of 1866 be construed as not including lands granted to the State by the swamp-land act, the result, where the two grants lap, would be this: the State of California would sustain an apparent diminution *pro tanto* in the appropriation of lands for the purposes named in the school-grant.

Here the situation of the State of California would nevertheless be one of *equality* with the other States referred to in cases where the two grants lap, the only difference being that with the latter States there would be an apparent dim-

School Lands in California—Indemnity.

inution of the appropriation of land for one public purpose, while with the State of California there would be an apparent diminution of the appropriation of land for another public purpose; yet as each State in those cases (*i. e.*, where the two grants lap) would get the *same quantity of land*, in this respect they would all be on an equal footing.

Should the indemnity provision of the act of 1866, however, be construed to extend to lands which passed to the State of California under the swamp-land grant, the situation of equality above adverted to would not exist, but, on the contrary, one of inequality would appear. In cases where the two grants lap, California would get double the quantity of land to which the other States referred to would be entitled under similar circumstances. Such a result, it seems to me, could not have been contemplated by Congress.

These considerations very strongly favor the view that the words "reserved for public uses," employed in the indemnity provision of the act of 1866, were not intended to be understood in so broad and general a sense as to cover lands granted to the State of California by the swamp-land act. And this view is, moreover, supported by the following facts: In the original draft of the bill, (Senate No. 343,) which afterwards became the law of 1866, it was by the sixth section thereof proposed to give the State of California the right "to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, covered by *swamp lands* or grants made under Spanish or Mexican authority," &c. Here it is fairly to be inferred, from the express mention of "swamp lands" in one of the clauses, that the words "reserved for public uses," occurring in the next preceding clause, were not used by the framers of the bill in so wide a sense as to include such lands, and that, but for the express mention of such lands, these would not in their view fall within the indemnity provision by force of those or any other words therein. On the recommendation of the Committee on Public Lands, the Senate amended the sixth section of the bill by striking out the words "swamp lands or," and, as thus amended, the section was ultimately enacted. (Cong. Globe, No. 72, p. 3078.) This action of the Senate,

LIMITATION UPON FILLING VACANCIES TEMPORARILY.

we may reasonably presume, was intended to exclude from the bill any provision for indemnity on account of swamp lands, in order to preserve the equality of the States, should it become a law, with respect to those cases where the school-land and swamp-land grants happen to lap. Such action could hardly have been intended for mere verbal correction, on the supposition that swamp lands were already comprehended by the words "reserved for public uses," and that the express mention thereof was unnecessary; for in the case of public grants the general rule is to construe them more strictly against the grantee, and those words, irrespective of the considerations above mentioned, might perhaps, without giving that rule undue prominence, be taken to apply only to reservations which are made for the use of the General Government, such as military reservations, &c.

The conclusion I arrive at is, that the words "reserved for public uses," as employed in the sixth section of the act of 1866, were not meant to cover those lands which passed to the State of California under the swamp-land act of September 28, 1850—that they refer solely to reservations made for the purposes of the General Government. And the same words, occurring in the seventh section of the act of March 3, 1853, must be deemed to have the same meaning and scope.

In reply, then, to your second question, which, in fact, contains two distinct interrogatories, I have the honor to state, that in my opinion the first of these interrogatories requires a negative and the other an affirmative answer, and I so answer them.

This renders a formal response to your first question unnecessary.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. CARL SCHURZ,

Secretary of the Interior.

LIMITATION UPON FILLING VACANCIES TEMPORARILY.

The ten days' limitation imposed by section 180 Rev. Stat. upon the temporary filling of vacancies occasioned by death or resignation is to be computed from the date of the President's action.

Burlington and Missouri River Railroad Company.

DEPARTMENT OF JUSTICE,
March 8, 1878.

SIR: Referring to your oral inquiry of me, founded upon the letter to you of Hon. W. W. Upton, Acting First Comptroller, whether under sections 178, 179, and 180 of the Revised Statutes he was authorized to continue in the discharge of the duties of that office, I have the honor to reply:

It appears from his letter that ten days have now expired from the death of the First Comptroller, Mr. Tayler, but that such period has not expired since he was designated by the President to perform the duties of the office in consequence of the sickness and necessary absence of Deputy First Comptroller Tarbell, and will not expire until the 15th instant.

Under these circumstances, I am of the opinion that the ten days referred to in section 180 must be computed from the date when the President acted, and that he, not having acted under the authority given him by the sections above mentioned until some time after the death of the First Comptroller, the ten days during which Mr. Upton's appointment has force does not expire until ten days from the date thereof; that is, in the present case, until the 15th instant.

I return the letter of the Acting First Comptroller and the appointment of the President to which he refers.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY.

In the matter of a claim of the Burlington and Missouri River Railroad Company of Nebraska, for military transportation: Advised (after review of the act of May 15, 1856, chap. 28; sections 18, 19, and 20 of the act of July 2, 1864, chap. 216; section 6 act of July 1, 1852, chap. 120; and joint resolution of April 10, 1869, which relate to the establishment of the road in Nebraska; and upon consideration of the provisions of the acts of June 16 and 22, 1874, and of March 3, 1875, forbidding the payment of military transportation to a certain class of railroads,) that payment be withheld from the company until its right thereto is judicially established.

Burlington and Missouri River Railroad Company.

DEPARTMENT OF JUSTICE,

March 8, 1878.

SIR: Yours of the 4th ultimo inquires whether or not the Burlington and Missouri River Railroad Company of Nebraska is to be considered and treated as one of the land-grant roads coming within the terms of the acts of June 16 and 22, 1874, and of March 3, 1875, forbidding the War Department to pay a certain class of railroads for military transportation.

That this corporation did receive a grant of land is conceded; the only query is, whether or not the grant was coupled with any such condition as to preclude payment being made to it by your Department.

The question is one by no means free from doubt. By act of May 15, 1856, chap. 28, the Burlington and Missouri River Railroad Company of *Iowa* obtained certain lands in that State upon the condition that the use of the road by the Federal Government should be "free from toll or other charge" for transportation. (11 Stats., 10, sec. 3.)

By act of July 2, 1864, chap. 216, sections 18, 19, and 20, *this same* "corporation, organized under and by virtue of the law of the State of Iowa," was authorized to extend its road through the Territory of Nebraska to a junction with the Union Pacific Railroad. To enable that company "to construct that portion of their road herein authorized," the right of way through, and of taking material from, the public lands traversed is conferred, and ten alternate odd-numbered sections per mile on each side of the road are given. (13 Stats., 364, 366.) These particular sections (chap. 216, sections 18, 19, 20) do not, of themselves, attach any express condition to the grant. The act, however, is merely amendatory of that of July 1, 1862, chap. 120, the sixth section of which gives the Government a preferred claim to the use of the roads there mentioned, the compensation for which is "not to exceed the amounts paid by private parties for the same kind of service," and is to be applied toward the payment of the debt due to the United States on account of bonds given to aid the construction of the road. The Burlington and Missouri River Railroad Company never received any assistance in this form.

Burlington and Missouri River Railroad Company.

By joint resolution No. 13, approved April 10, 1869, the company to which the grant of July 2, 1864, chap. 216, sections 18, 19, 20, was made, was authorized to assign the same "to a railroad company to be organized under the laws of the State of Nebraska, with all the rights, powers, and privileges granted and conferred by *said act*, and subject to all the conditions and requirements *therein* contained." (16 Stats., 54.)

It will be remembered that the stipulation that governmental transportation should be free from all toll or other charge is not found in *that act*, but is attached to the original grant of May 15, 1856, chap. 28, section 3, (11 Stats., 10.)

The prohibitory clause of the act of June 16, 1874, forbids the payment of any part of the sum thereby appropriated "for the transportation of any property or troops of the United States over any railroad which, *in whole or in part*, was constructed by the aid of a grant of public land on the condition that such railroad should be 'a public highway for the use of the Government of the United States, free from toll or other charge,' or upon any other conditions for the use of such road for such transportation." The deficiency act of June 22, 1874, omits this last clause, and only confines the prohibition to those roads over which troops and property were to be transported free, while the act of March 3, 1875, returns to the phraseology of the act of June 16, 1874, but adds a proviso, making it inapplicable "to roads where the *sole* condition of transportation is that the company shall not charge the Government higher rates than they do individuals for like transportation, and when the Quartermaster-General shall be satisfied that this condition has been faithfully complied with."

Many difficult questions arise from this complex legislation : 1st. Was the condition annexed to the original grant to the Iowa corporation confined to so much of the road as was built by its aid in that State, or would the right of free use attach to the road if built through Nebraska by the Iowa corporation under the permission and by means of the further grants given it ? 2d. If so, and it is admitted that a general transfer of all rights and obligations would have put the assignee in the same position as the assignor, is the Nebraska corporation now subject to the duty of free transportation,

Burlington and Missouri River Railroad Company.

the only express declaration of the statute authorizing the assignment being that it shall assume all the obligations imposed by the act of July 2, 1864? 3d. Do the conditions of the act of July 1, 1862, chap. 120, section 6, attach to the grant to the Iowa road found in the act of July 2, 1864, chap. 216, sections 18 to 20? If so, the appropriation act of June 16, 1874, would prevent the application of any of the funds thereby provided to the payment for transportation over this road, and it might be argued that the provision for an allowance of credit, instead of a cash payment, affected the right to pay this road, though this is thought hardly a tenable objection, as this corporation received no bonds from the Government.

The head of any Executive Department is entitled to the opinion of the Attorney-General "on any question of law arising in the administration of his Department," when such opinion is necessary to enable him "and the heads of bureaus and other officers in the Departments to discharge their respective duties." (Rev. Stats., sections 356, 357, and 361.)

The duty here the subject of inquiry is that of paying for military transportation. From the language of the several prohibitory acts cited, authorizing suits to be brought by the railway companies in the Court of Claims, it is evident that Congress contemplated the judicial settlement of such questions as might arise, which might be decided for one party or the other in that court, subject to a right of appeal to the Supreme Court. It is believed that the Attorney-General has performed the duty required of him when he has advised the Secretary of War (as he now does) that the questions pertaining to the claim of the Burlington and Missouri River Railroad Company in Nebraska, hereinbefore indicated, are sufficiently serious and doubtful fairly to call for the judicial consideration and decision for which these statutes provide.

It is therefore advised that in the administration of the War Department, and in the discharge of its official duties by you and your subordinates, payment for military transportation be withheld from this company until its right thereto is established and defined in the manner provided by law.

This course is recommended more especially because the adoption of any erroneous legal construction in favor of the

Loss of Registered Mail Matter.

road would inflict a lasting and irremediable injury upon the United States, whereas an error against the claimant only involves the loss of the temporary use of the money, and can speedily be corrected by an application to the court.

The papers transmitted are herewith returned.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,

Secretary of War.

LOSS OF REGISTERED MAIL MATTER.

The Postmaster-General has no authority, under section 398 Rev. Stat., to negotiate a postal convention providing for the payment of indemnity for the loss of registered articles or letters. To enable him to do so further legislation is required.

DEPARTMENT OF JUSTICE,

March 12, 1878.

SIR: You inquire in your letter of the 11th instant whether a provision can be inserted in the treaty of October 9, 1874, or such other postal union treaty as may be hereafter made, by which the principle of paying indemnity for the loss of registered articles or letters can be admitted and such payment legally executed by the Post-Office Department of the United States in accordance with such provision, in the absence of legislation authorizing the payment of indemnity for such losses in the United States domestic service.

In reply, I have the honor to say that the authority given to the Postmaster-General by and with the advice and consent of the President to negotiate and conclude treaties or conventions under section 398 of the Revised Statutes is a limited one, and must be construed in connection with the remaining provision of the section, that he may reduce or increase the rates of postage on mail matter between the United States and foreign countries. Undoubtedly, by such a convention such reduction or increase may be agreed upon, and all matters may be provided for which are appropriate subjects of regulation by the Post-Office Department. But, in my opinion, authority is not thereby given to introduce a new principle into the legislation of the United States upon

Case of Commander J. N. Quackenbush.

the postal service, nor to provide for indemnity for any losses of registered letters or packages when no such provision has been made by the general law of the United States. If such an agreement were made, there exists no fund at the disposal of the Postmaster-General from which he could pay such indemnity, as the appropriations made for the service are for specific purposes or for contingencies immediately connected with such specific purposes.

To answer your inquiry directly, therefore, it would require legislation in order that any such convention should be entered upon by the Postmaster-General by and with the advice and consent of the President.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. DAVID M. KEY,
Postmaster-General.

CASE OF COMMANDER J. N. QUACKENBUSH.

Q., a commander in the Navy, having been tried and sentenced to dismissal from service by a naval court-martial, the record of the proceedings and sentence was submitted to the President, who, on the 5th of June, 1874, approved the same. On the 9th of same month the Secretary of the Navy addressed a letter to Q. (then in Boston) informing him of the approval of the sentence, and stating that from that date (June 9, 1874) he would "cease to be an officer of the Navy." On the 12th of same month the Secretary again addressed a letter to Q., asking him to return the letter of dismissal. On the 8th of December following the Secretary addressed a third letter to Q., stating that the sentence of the court-martial "was, on the 9th day of June, 1874, mitigated to suspension from rank, &c., to date from that day." In the meantime, viz, on the 10th of June, S., a lieutenant-commander, was nominated to be a commander in the Navy, from the date last mentioned, vice Q., dismissed, and this nomination was confirmed on the 12th of June, and a commission issued to S. same day.

Held: (1.) That the letter of the Secretary of the Navy of December 8 is satisfactory proof, not only of the mitigation of the sentence by the President, but that it was mitigated by him on the 9th of June. (2.) That the letter of dismissal, in execution of the sentence, forwarded by the Secretary on the 9th of June (it being manifest that the complete execution of the sentence, by means of that letter, could not take place on that day), was then revocable; and the mitigation of the sentence was in effect a revocation of the letter. (3.) That it was competent to

Case of Commander J. N. Quackenbush.

the President, under the circumstances, to mitigate the sentence when he did. (4.) That the subsequent appointment of S. could not render ineffectual the previous mitigation of the sentence.

In view of the fact that the *mitigated* sentence has been put in execution by a former administration, by which all questions in the premises must be presumed to have then been fully considered: *I* advise that this action be now treated as a final determination of the matter as regards the status of Q.

DEPARTMENT OF JUSTICE,
March 16, 1878.

SIR: I have considered the questions presented in your letter of the 13th of December last, relative to the case of Commander J. N. Quackenbush, of the Navy. The facts of the case are briefly these:

Commander Quackenbush having been sentenced to dismissal from service by a naval court-martial, the record of the proceedings and sentence of the court was submitted to the President, who, on the 5th of June, 1874, by an indorsement on the record, approved the sentence.

On the 9th of the same month the Secretary of the Navy addressed a letter to Commander Quackenbush, at Boston, informing him of the sentence of the court-martial and of its approval by the President, and stating that from that date (9th June, 1874) he would "cease to be an officer of the Navy."

On the 12th of June, 1874, the Secretary of the Navy again addressed a letter to Commander Quackenbush, at Boston, asking him to return the order dismissing him from the Navy; and the latter returned the order to the Secretary under cover of a letter dated the 15th of June, 1874.

On the 8th of December, 1874, the Secretary of the Navy again addressed a letter to Commander Quackenbush, at Boston, stating that the sentence of the court-martial "was, on the 9th day of June, 1874, mitigated to suspension from rank and duty, on furlough pay, for six years, the suspension to date from that day." And the Fourth Auditor of the Treasury was so notified the same day.

On the 10th of June, 1874, Lieutenant-Commander Winfield S. Schley was nominated "to be a commander in the Navy, from the 10th of June, 1874, *vice* Commander John N. Quackenbush, dismissed." The nomination was confirmed June 12, 1874, and a commission issued to him on the same day.

Case of Commander J. N. Quackenbush.

Upon this state of facts you inquire, "Whether it is competent to admit parol proof or evidence that the President assented to the mitigation, on the 9th of June, of the sentence of dismissal; and, if so, whether the President had the power to so remit after the sentence of dismissal had been approved and duly executed and the vacancy filled?"

Presuming that the first branch of your inquiry—that part of it which relates to the admissibility of "parol proof" that the President assented to the mitigation of the sentence on the 9th of June—is propounded with reference solely to the admissibility of the letter of the Secretary of the Navy of the 8th of December as evidence of the fact just mentioned, I submit that this letter cannot properly be viewed in the light of mere parol evidence of such fact. It is an official document, pertaining to a matter which necessarily came within the official observation of the Secretary, and, regarded simply as such, is entitled to be received as at least *prima facie* proof of what is therein stated touching that matter; but being, moreover, an act which in contemplation of law proceeds from the President himself, it must be deemed to be evidence of the very highest order of the particular fact above referred to. The directions of the President respecting the mitigation of a court-martial sentence may be, and frequently are, given *ore tenus*, and left to be formally made known and carried out through the head of the appropriate Department. When this is the case, the orders or instructions of the latter, issued in discharge of that duty, constitute primary and, perhaps, conclusive evidence of what the directions of the President were.

Agreeably to these views, the letter of the Secretary of the Navy of the 8th of December must be considered satisfactory proof, not only of the mitigation of the sentence by the President, but that it was mitigated by him on the 9th of June, the time stated in the letter—supposing, of course, that the power to mitigate might then have been exerted by the President.

I come now to the remaining branch of the inquiry, which is as to the power of the President to mitigate the sentence, after it had been "duly executed, and the vacancy filled." If, indeed, the sentence had been duly and completely exe-

Case of Commander J. N. Quackenbush.

cuted when the President gave his directions mitigating the same, (*i. e.*, on the 9th of June,) in that case, the punishment being then already incurred, there would have been nothing left for the power of mitigation to operate upon, and such directions would consequently be productive of no effect. But I assume that the object of this branch of the inquiry is to elicit my opinion as to whether, in regard to the sentence referred to, the power of mitigation could be effectually exercised by the President at that period, under the peculiar circumstances stated in your letter. The circumstances are:

1. On the 9th of June a letter of dismissal from service, in execution of the sentence, was written by the Secretary of the Navy and forwarded to the officer, the latter being then at a distant point (Boston).

There is nothing in this fact which precluded the President from afterwards, on the same day, mitigating the sentence; as it is manifest that the complete execution thereof, by means of that letter, could not take place on that day. The letter was certainly revocable *then*, if not at even a still later period; and the mitigation of the sentence was in effect a revocation of the letter. The letter required no act to be done in execution of the sentence, but was itself the act by which that was to be consummated—its receipt by the officer, or what is equivalent thereto, being all that was necessary to make the act complete and effective. Yet if the letter was received by the officer, as it must have been, after the sentence was mitigated by the President, though long before notice of the mitigation had been imparted to him, it should, I think, notwithstanding the latter fact, be regarded as having lost its virtue when so received, and as being then inefficient for the execution of the sentence.

2. On the 10th of June Lieutenant-Commander Schley was nominated to be a commander, "*vice* Commander J. N. Quackenbush, dismissed," and the nomination was confirmed June 12, and a commission issued same day.

This nomination, following so closely upon the letter of dismissal written by the Secretary of the Navy, is apparently inconsistent with the subsequent statement by him that the sentence was mitigated at the time mentioned. It assumes, indeed, the complete execution of the sentence—

Case of Commander J. N. Quackenbush.

that the officer was thereby dismissed; and is an official act based on that assumption. But it did not of itself directly affect or change the previous or then existing status of such officer. Thus, had the nomination been made after the approval of the sentence of dismissal, but before any thing was done in execution thereof, it could hardly be considered as constituting a sufficient execution of that sentence.

So, the confirmation of the nomination, and the issue of a commission thereupon, did not necessarily produce any alteration of the status of the officer under sentence—did not execute the sentence. I am not prepared to say that, had the issue of the commission taken place and the promotion of Schley thus been perfected, *after* the letter of dismissal was written and forwarded by the Secretary, and *before* any mitigation of the sentence was directed by the President, such a condition of things might not have supervened as would preclude thereafter the revocation of that letter or the exercise of the power to mitigate the sentence; as, for instance, if the complement of the grade to which the appointment was made would be exceeded by the revocation. But according to the statement in the letter of the Secretary of the 8th of December, the sentence was in fact mitigated on the day previous to the nomination of Schley, and three days prior to the issue of his commission; and, besides, it does not appear that his promotion produced any excess.

It may be that the “*vice*” in the nomination was made by inadvertence; and, in view of the statement just adverted to, it cannot be regarded otherwise than as thus originating.

The general result at which I arrive, upon this last branch of your inquiry, is, (1) that it was competent to the President to mitigate the sentence on the 9th of June, although on the same day a letter of dismissal, in execution of the sentence, had already been written and sent off; (2) that the subsequent appointment of Schley could not paralyze or render ineffectual a mitigation of the sentence made on that day.

In this connection I will add, that these views appear to accord with the official action of the late administration of the Navy respecting this matter. By that action the *mitigated* sentence was put in execution, and it has thus continued ever since—the officer being thereby suspended for a

Lost Registered Bond.

term of years not yet expired, instead of dismissed. It may reasonably be presumed that all questions in the premises, touching the power of the President to mitigate, the fact of mitigation, &c., were fully considered *then*, and, as is indicated by the action referred to, with like result as that above stated. That action may now be treated as a final determination of the matter, as regards the status of Commander Quackenbush.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. R. W. THOMPSON,
Secretary of the Navy.

LOST REGISTERED BOND.

Where satisfactory proof is furnished that a registered bond, called in for redemption, has been lost, payment thereof may be made upon a bond of indemnity being given by the owner in conformity with the requirements of section 3705 Rev. Stat.

DEPARTMENT OF JUSTICE,

March 20, 1878.

SIR: Herewith I submit for your consideration a reply to your note of yesterday, which states the following case and question:

"Section 3702 of the Revised Statutes provides that where it appears, &c., that any interest-bearing bond of the United States has, without bad faith, &c., been destroyed, &c., or so defaced as to impair its value to the owner, the Secretary of the Treasury shall, under certain regulations, issue a duplicate thereof; and it is further provided in the same section that when such destroyed or defaced bonds appear to have been of such a class or series as has been or may, before such application, &c., be called in for redemption, *instead of issuing duplicates thereof, they shall be paid, &c.*

"Section 3704 of the same statutes provides that whenever it is proved, &c., that any duly registered bond, &c., has been lost or destroyed, &c., the Secretary shall issue a duplicate of such registered bond, &c.

"This last-named section does not provide for the payment

Resignation of Insane Officer.

of *lost* bonds called in where there is no evidence of their having been destroyed.

"Will you favor me with your opinion, whether, in case of satisfactory proof being furnished that a registered bond has been lost, through theft or otherwise, the bond ought to be paid, if it has been called in for redemption, upon a bond being given substantially in conformity with the requirements of section 3703 of said statutes?"

The difference between section 3702 and 3704 upon the point mentioned by you is that *lost registered bonds* are to be replaced by duplicates, whether they have been called in for redemption or not. Section 3704 does not draw the distinction which appears in section 3702, and is based upon the circumstance that a lost bond has been *called in*. The phrase "bearing interest," of course, designates the class to which the paper must belong, and does not mean that interest is actually accruing at the time of application by the owner.

Understanding that the section meant to be referred to in the question asked by you is 3705 and not 3703, it seems clear that such question should be answered in the affirmative.

Very respectfully,

S. F. PHILLIPS,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

RESIGNATION OF INSANE OFFICER.

The opinions of Attorney-General Cushing and Attorney-General Bates (see 6 Opin., 456, and 10 Opin., 229) to the effect that, on general principles of law, the resignation of an officer while insane is to be deemed void, and that, although it may have been accepted without knowledge of the insanity, the acceptance can be recalled and the officer reinstated without a new appointment, reaffirmed; subject, however, to the following qualification, viz., that the Executive Department, after having accepted the resignation, has done no act which prevents the restoration of the *status quo* without impairing or prejudicing the rights of other officers acquired in consequence of such act. Where a resignation of an Army officer has been tendered and accepted without anything more, and a question of insanity afterwards arises, it is competent to the War Department to hear and consider evidence upon the question, and decide and act accordingly.

Resignation of Insane Officer.

But where, after acceptance of the resignation and without knowledge of the insanity, the place of the officer has been filled by appointment of another thereto, the resignation must be regarded as effective.

DEPARTMENT OF JUSTICE,

March 22, 1878.

SIR: By your letter of the 5th ultimo you request my opinion upon the following questions:

"1. Should this (the War) Department treat as absolutely void a resignation by an officer of the Army, tendered and accepted while such officer was insane?

"2. In a case where such resignation was tendered by an insane officer in 1869, and accepted, and the place of such officer filled by a nomination to, and confirmation by, the Senate, is such insane officer in case of his recovery, or his guardian in case he remains insane, entitled to pay in the interim and for the period during which his successor has been paid?

"3. Can this (the War) Department hear and consider evidence upon the question of insanity in such a case, and upon such hearing decide the same?"

In reply I have the honor to state:

The authorities to which you refer me (6 Opin., 456, and 10 Opin., 229) affirm that, on general principles of law, the resignation of an officer while insane is to be deemed void, and that, although it may have been accepted in the absence of any knowledge of the insanity, the acceptance can be recalled and the officer be restored to his place without reappointment, the whole (the resignation and the acceptance) being treated as a nullity. The cases then under consideration arose in the Navy, but the same doctrine is applicable to similar resignations in the Army.

I concur fully in those views, subject, however, to this qualification, that the Executive Department, after having accepted the resignation, has done no act which prevents the restoration of the *status quo* without impairing or prejudicing the rights of other officers acquired in consequence of such act. Thus if, after the acceptance of the resignation and before that Department has information of the insanity of the officer who tendered it, the place of the latter has been filled by the appointment of another thereto, the resignation must

Bond of Mail Bidder.

I think, be regarded as effective; since in this case the former condition of things cannot well be restored, except by the displacement, and therefore to the prejudice, of the new appointee. Upon the same principle, it is settled that where the contract of a lunatic, entered into with a person who acted *bona fide* and without knowledge of the lunacy, has been executed or performed, it cannot afterwards be set aside. The confusion which the doctrine laid down by the authorities referred to, if undertaken to be applied without the qualification mentioned, would be likely to introduce in the military service, seems to me to require that limitation upon its application.

I am accordingly of the opinion that your first question should be answered in the affirmative, (this, of course, to be understood as subject to the qualification above stated,) and that your second question should be answered in the negative.

If the "case" mentioned in the third question refers to that stated in the second, an answer to the former is rendered unnecessary by the response already given to the latter. In the case of a resignation tendered and accepted, without anything more, and in which a question of insanity afterward arises, I am of the opinion that your Department may hear and consider evidence upon the question, and decide and act in accordance therewith. (Compare 10 Opin., 229.)

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. MCCRARY,

Secretary of War.

BOND OF MAIL BIDDER.

A bond which accompanies a proposal for carrying the mail, though actually signed by the parties thereto in one of the States, is to be regarded as made at Washington, the intended place of delivery.

Hence, where a married woman is on such a bond as a surety for her husband, her capacity to enter into the contract for suretyship and thereby to subject her separate property to liability, must be determined by the laws of the District of Columbia.

Under the laws of the District, a married woman cannot thus bind her separate property.

Bond of Mail Bidder.

DEPARTMENT OF JUSTICE,

March 22, 1878.

SIR: By your letter of the 7th instant, inclosing certain papers relative to the proposal of Mr. J. P. Price for carrying the mails of the United States, you inquire "whether the bond which accompanies the said proposal, and is a part thereof, is rendered invalid by reason of the signature of Mrs. Price as one of the bondsmen, she being the wife of the bidder."

To this I reply that, in my opinion, the bond would not be rendered invalid by reason of the fact that she was the wife of the bidder, even if she was not competent to contract. It would still be a sufficient contract as against the other surety or sureties who might be upon it.

As I presume, however, that your inquiry is rather as to the validity of Mrs. Price's own signature than with reference to the validity of the bond itself, I proceed to answer that.

The first matter to be determined is whether or not this is to be considered as a contract made in Missouri, or as a contract made in Washington, as the laws of Missouri and of the District of Columbia may be different in regard to the capacity of married women to make contracts. Upon this point I am of opinion that the place of the contract must be considered as Washington. Although the bond was actually signed in Missouri, it was there executed imperfectly, and only with the intention that it should be delivered in Washington and there acquire its validity. This view of contracts made elsewhere and yet intended to have force and effect at Washington is maintained in the cases of *Cox vs. The United States* (6 Pet., 172) and *Duncan vs. The United States* (7 Pet., 435).

We must therefore inquire whether Mrs. Price was competent to make a contract in Washington of suretyship upon the bond of her husband; because, even if we assume that by the law of Missouri she might properly do so, the validity of the contract is to be decided by the law prevailing in the District of Columbia.

On examining the laws of the District, it will be found that the capacity of a married woman to contract is much more limited than it is in some of the States, and probably more so

Bond of Mail Bidder.

than in the State of Missouri, where, it would seem from an examination of the decision referred to by the counsel for Mr. Price, she might properly make such a contract. By the Revised Statutes, section 729, "any married woman may contract, sue, and be sued, in her own name in all matters having relation to her sole and separate property in the same manner as if she were unmarried." The contracts which she may make under this statute, therefore, as if she were an unmarried woman, are those which relate to her sole and separate property. She is not invested with a general capacity to contract by virtue of which she may subject her separate property to liability, but with the limited power of contracting only in relation to that sole and separate property. In my opinion, therefore, she is not authorized to make a contract of suretyship for her husband, and, if she enters upon such a contract, she will not thereby bind her sole and separate property, because it is not a contract having relation thereto.

Much variety of decision may be found in regard to the right of married women to contract under the laws which have lately been passed in nearly all of the States of the Union. The conflict among these decisions may in many instances be reconciled by examining the statutes prevailing in the State where the decision is made, and I think it will be found that in those States where only the limited power is given with which she is invested by the laws of the District of Columbia, namely, that of contracting in matters having relation to her sole and separate property, it has always been held that she was not invested with a general capacity to contract and thereby to charge her separate property. (See *Athol Machine Co. vs. Fuller*, 107 Mass., 437; *Frecking vs. Rolland*, 53 N. Y., 422; *De Vries vs. Conklin*, 22 Mich., 255; *Conway vs. Smith*, 13 Wis., 125; and *Brookings vs. White*, 49 Me., 479.)

I have examined the marriage settlement of Mrs. Price, but it can hardly be contended that that would invest her with a greater capacity to contract than that which is given by the statute.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. DAVID M. KEY,

Postmaster-General.

Bounty to Colored Soldiers.

BOUNTY TO COLORED SOLDIERS.

The heirs or legal representatives of deceased colored soldiers enlisted during the rebellion, and borne on the rolls as slaves, are, by virtue of the act of March 3, 1873, chap. 262, (section 4723 Rev. Stat.,) entitled to bounty; the effect of that statute being to extend the provisions of the bounty acts alike to all colored soldiers, whatever their former status might have been.

DEPARTMENT OF JUSTICE,
March 26, 1878.

SIR: In compliance with your request, which accompanied the two letters from F. W. Golladay, esq., sent to me by your direction in October last, I have now the honor to state my views upon the question suggested in those letters, viz: Whether the heirs or legal representatives of deceased colored soldiers enlisted during the rebellion, and borne on the rolls as "slaves," are, by virtue of the act of March 3, 1873, chap. 262, (section 4723 Revised Statutes,) entitled to bounty.

The language of that statute (as contained in section 4723 Rev. Stat.) is: "All colored persons who enlisted in the Army during the war of the rebellion, and who are now prohibited from receiving bounty and pension on account of being borne on the rolls of their regiments as 'slaves,' shall be placed on the same footing as to bounty and pension as though they had not been slaves at the date of their enlistment."

The purpose of this enactment, it seems to me, is to do away with the discrimination previously made between colored soldiers who had been in slavery, and were borne on the rolls as slaves, and other colored soldiers. Thus while bounty was allowed to the latter, and, in case of death before payment, to their heirs or legal representatives, in the order prescribed by the bounty laws, it was wholly denied to the former. Both descriptions of colored soldiers appear to be placed by the statute upon an equality with respect to this liberality of the government. Those who were excluded from the benefits of the bounty laws for the reason that they appear on the rolls as slaves are thenceforth to be viewed as if that ground of exclusion never existed. This removal of the foundation for the above-mentioned discrimination leaves the provisions of

Duty of Attorney-General.

the bounty acts to extend and apply alike to all colored soldiers, whatever their former *status* might have been. It follows that in cases where, under the bounty laws, the heirs of deceased colored soldiers not appearing on the rolls as slaves would be entitled to bounty, in such cases the heirs of deceased colored soldiers borne on the rolls as slaves must also be deemed to be entitled to bounty; otherwise, it is submitted, the latter description of colored soldiers would not stand on the "same footing" as to bounty with those of the former description, and the object contemplated by the law not be fully carried out.

I am therefore of the opinion that the question suggested in the letters to which you were pleased to refer to me should be answered in the affirmative.

I am, sir, very respectfully,

CHAS. DEVENS.

The PRESIDENT.

DUTY OF ATTORNEY-GENERAL.

The Attorney-General is not authorized, by the law creating and defining his office, to give legal opinions at the call of either House of Congress or of Congress itself. His duty to render such opinions is limited to calls from the President and heads of Departments.

DEPARTMENT OF JUSTICE,

March 27, 1878.

SIR: I have the honor to acknowledge the receipt of the following resolution, dated March 16, 1878:

"Resolved, That the Attorney-General of the United States be requested to inform the House of Representatives whether in his opinion the annual appointments of ten cadets at large made by the President of the United States respectively to the Military Academy and Naval Academy have been made in pursuance of law or by custom, and, if by custom, how long it has been construed as establishing such power of appointment."

I understand that the object of this resolution is not to elicit the facts connected with the appointments referred to in it; as, if so, it would no doubt have been addressed to the

New Post-Office Building in New York.

War Department, the means of obtaining such facts being there and not in this Department.

It is therefore desired, as I understand, that I should render a legal opinion upon the subject to which the resolution refers.

In that view, I must reply that I am not at liberty to furnish the legal opinion contemplated. The authority of the Attorney-General to render his official opinion is limited by the laws which create and define his office, and does not permit him to give advice at the call of either House of Congress or of Congress itself, but only to the President or the head of an Executive Department of the Government. The absence of authority to respond to calls for legal opinions coming from sources other than those prescribed by law was early in the history of the Government suggested to the House of Representatives by the then Attorney-General, Mr. Wirt, (1 Opin., 335,) and no change in this respect has been made by the law creating the Department of Justice. The view thus taken has been invariably observed by my predecessors, including Attorneys-General Taney, Crittenden, Bates, Evarts, and Williams. (2 Opin., 499; 5 Opin., 561; 10 Opin., 164; 12 Opin., 544; 14 Opin., 17; 14 Opin., 177.)

I therefore feel that neither my high respect for the express wish of your honorable body nor my earnest desire to comply with any request that it might make would warrant a departure in the present instance from the law and precedents which have heretofore been established.

Very respectfully,

CHAS. DEVENS.

The SPEAKER

Of the House of Representatives.

NEW POST-OFFICE BUILDING IN NEW YORK.

The condition in the deed of the city of New York, conveying to the United States the site (viz, the lower part of the City Hall park) of the new post-office and court-house building, by which the title is subject to forfeiture in case the ground conveyed ceases to be used for the purposes of a post-office and court-house or either, or in case it is used for any other public purpose, is not violated by the occupancy

New Post-Office Building in New York.

and use of some of the rooms in the new building by certain officers of the internal revenue, steamboat inspection, and other service under the control of the Treasury Department.

DEPARTMENT OF JUSTICE,

March 30, 1878.

SIR: Referring to the inquiry in your letter of the 20th instant, relative to the condition contained in the deed of conveyance from the city of New York covering the site of the new post-office and court-house building erected there by the Government, a copy of which instrument accompanied that letter, I have the honor to reply:

It appears in the recitals of the deed that by a resolution of the mayor, aldermen, and commonalty of the city, passed December 18, 1866, the premises (the lower part of the City Hall park) were authorized to be "sold and conveyed to the United States Government as a site or location for a post-office and court-house, and to be used by the said United States Government for said purposes exclusively, for the sum of five hundred thousand dollars, the conveyance to contain a provision that when the same shall cease to be used for the purposes specified, or for some one of them, the title shall revert to and be reinvested in the mayor, aldermen, and commonalty of the city of New York." It is further recited that the United States "have agreed to purchase said premises upon the terms and conditions contained in said resolution and to accept a conveyance of the said premises upon the said terms and conditions."

The deed then conveys the premises to the United States upon the following conditions, viz: "That the premises above described, and every part and parcel thereof, and any building that may be erected thereon, shall at all times hereafter be used and occupied exclusively as and for a post-office and court-house for the United States of America, and for no other purpose whatever, and upon the further condition that if the said premises shall at any time or times cease to be used for the purposes above limited or for some one of them, or if the same shall be used for any other purposes than those above specified, the said premises hereby conveyed, and all right, title, estate, and interest therein shall revert to and be rein-

New Post-Office Building in New York.

vested in the said parties of the first part," &c. This is followed by a clause for re-entry.

You observe that since the erection of the public building upon the premises rooms therein have at various times been assigned by your Department for the use of certain officers connected with the secret service, the steamboat-inspection service, the internal revenue, &c., and you inquire whether the occupancy of these rooms by such officers is a breach of the said condition, and how this affects the title to the property.

It will be seen that the resolution under which the sale and conveyance were made required such sale and conveyance to be upon condition that the premises should be used by the Government exclusively for the purpose of erecting a post-office and court-house thereon, the title of the Government to determine in the event of the premises ceasing to be used for either or both of those purposes. The condition here contemplated is a condition subsequent, having reference to the use of the ground conveyed; and conditions of this sort, when they tend to defeat estates, are construed strictly. The object in view in requiring such condition would seem to have been to secure the permanent location of both the post-office and court-house at that particular point, and it may likewise have been to prevent the premises being used for any other public purpose than that of a site for the post-office and court-house. Thus the grantor, though willing to part with the property for the erection of a post-office and court-house thereon, may not have been willing to convey if the same was to be used as a site for a jail, an arsenal, or a custom-house. It does not appear to have also comprehended the regulation of the use of the post-office or court-house building itself further than that such building should be used as a post-office or court-house. Consequently, so long as the building is thus used, and maintains the character and answers the description of a post-office and court-house building, there would, I think, be no breach of the condition contemplated in the resolution if some of the rooms of the building, not needed for the post-office or the courts, were made use of by the Government for the accommodation of other branches of the public service.

New Post-Office Building in New York.

The condition inserted in the granting part of the deed is apparently broader than that required by the resolution, in so far as it affects the building erected on the premises; but the clause of defeasance therein is not more comprehensive than what the resolution calls for. By this clause the title is subject to forfeiture only in case the ground conveyed ceases to be used for the purpose of a post-office and court-house, or either, or in case it is used for any other public purpose, as, for example, for the location of a custom-house or barracks, &c. The defeasance thus limits the breaches of the condition on which forfeiture may be claimed to those which concern the use of the *ground*. It makes of that condition substantially such a one as is contemplated by the resolution; and what I have said respecting the latter is equally applicable to the former. The premises do not, within the intent and meaning of that condition, cease to be used for the exclusive purposes of a site for a post-office and court-house building, where such a building and no other has been erected thereon and is occupied by the post-office and the courts, though some portion of the building itself is in the occupancy of Government officers not connected with the post-office or the courts.

I am accordingly of the opinion that the use of some of the rooms in the post-office and court-house building in New York by the officers mentioned in your letter does not amount to a breach of the condition contained in the deed of conveyance referred to.

But in case of a breach the title would not thereby become divested. It would require, in addition, an entry on the part of the city, or some act equivalent to an entry, made with a view to take advantage of the breach, in order to produce that result; and in the meantime the title would remain precisely as it was before the breach.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. JOHN SHERMAN,

Secretary of the Treasury.

Transfer of Jurisdiction.

TRANSFER OF JURISDICTION.

Consent of the legislature of Texas to the purchase by the United States of the building site recently acquired in the city of Austin was given by operation of a law of that State passed April 4, 1871. Held that such consent worked a transfer of jurisdiction over the site from the State to the United States when the title to the site became vested in the latter.

DEPARTMENT OF JUSTICE,
April 10, 1878.

SIR: To your inquiry of the 14th ultimo, as to whether jurisdiction over the site for a public building recently acquired by the Government in the city of Austin, Tex., is now in the United States, I have the honor to reply:

By a law of Texas, passed April 4, 1871, the consent of the legislature of that State is "given to the purchase by the Government of the United States, or under the authority of the same, of any tract, piece, or parcel of land from any individuals, bodies politic or corporate, within the boundaries or limits of the State, for the purpose of erecting thereon lighthouses and other needful public buildings whatever," &c.; such consent "being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided."

Under this law, which operates prospectively, and applies to any and all purchases for the purposes specified therein, as the same may from time to time be made, the consent of the legislature of the State of Texas to the acquisition of the site in question by the United States must be considered as having been given when the transfer of the title to the site became complete. Upon such consent the jurisdiction of the State ceased, and that of Congress attached by virtue of the Constitution; it being settled that all such jurisdiction as the Constitution contemplates may be gained by the United States in the mere consent of the State to the purchase. (See 7 Opin., 629.)

I am accordingly of the opinion that jurisdiction over the site is now in the United States.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. JOHN SHERMAN,
Secretary of the Treasury.

Contract:

CONTRACT.

The Secretary of the Navy has not power, under the circumstances stated, to release a contractor from his undertaking to furnish (among other enumerated articles) "a saw, futtock, for boat-builders' use, Knowlton's patent," to the several navy-yards.

DEPARTMENT OF JUSTICE,

April 12, 1878.

SIR: Yours of the 5th instant asks if you have authority to release Mr. H. Lissberger from his contract to deliver—among other things enumerated in "Class No. 53," to be supplied to the Norfolk navy-yard—"a saw, futtock, for boat-builders' use, Knowlton's patent, complete in all respects." The engagement extended to the other navy-yards also.

Mr. Lissberger says his bid was based upon the idea that only a common saw-blade, costing \$2.75, was to be furnished under the foregoing language. The patentee asks \$2,150 for a "Knowlton's bevel scroll-saw," &c., the articles required at the navy-yards. If Mr. Lissberger is right in asserting that this patented saw was not designated by the phraseology employed, he needs no release from an obligation into which he has not entered. This opinion proceeds, therefore, upon the assumption that Mr. Lissberger is bound to furnish the Knowlton saw as being an article accurately described to bidders, and discusses only the precise question asked, whether you have legal authority to release him from this obligation.

There were three other proposals for filling "Class No. 53" for these sums, viz: \$2,325.55, \$2,722.30, and \$2,818.70. The disparity between these amounts and that named by Mr. Lissberger (\$1,032.15) sufficiently indicates that the other bidders *did* expect to furnish the required futtock-saw. Though its retail price is stated at \$2,150, we may safely assume, for the purposes of this discussion, that it would be supplied for all the navy-yards at \$2,000; but, if not, taking the full price (\$2,150) does not affect the argument. Deduct \$2,000 from the other bids made, and we have \$325.55, \$722.30, and \$818.70 as the sums for which the competing bidders proposed to supply the articles included in Class No. 53, exclusive of the saw. Subtract from Mr. Lissberger's bid the \$2.75 which he expected to pay for a saw-blade, and you have \$1,029.40 as the

Chicago, Burlington and Quincy Railroad Company.

price placed by him upon the other articles in that class. If, therefore, he is now released as to this item, the award will, in effect, have been made to the *highest* instead of to the *lowest* bidder. Such a result is so adverse to the evident legislative intent, that it is not considered that the power to accomplish it lawfully exists. It is not the compromise of a doubtful claim, nor the settlement of a contract departed from by mutual consent for the benefit of the Government. Power to do these things must be conceded to the Secretary of the Navy. (*United States vs. Corliss Steam-Engine Company*, 91 U. S., 321.) But it is asked that the contractor shall, without any consideration therefor, be released from the full performance of his contract, and from the delivery of an article still required by the necessities of the Government, when (as before observed) the effect of such a course will be to give the contract to the highest bidder as to all supplies furnished under it. This would be virtually to give away the public property and funds, and to disregard the law relating to the award of contracts. My opinion is that you have not the lawful power to grant the relief desired.

Very respectfully, your obedient servant,

CHAS. DEVENS.

Hon. R. W. THOMPSON,

Secretary of the Navy.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

Upon the facts stated, the mail transportation performed by the Chicago, Burlington and Quincy Railroad Company subsequently to July 1, 1875, was (not service under a contract, but) "recognized service"; and the action of the Postmaster-General, on the 16th of October, 1876, abating the rate payable to the company 10 per centum, in accordance with the provisions of section 1 of the act of July 12, 1876, chap. 179, was proper.

DEPARTMENT OF JUSTICE,

April 13, 1878.

SIR: Yours of the 25th ultimo, addressed to the Attorney-General, referring to a claim by the Chicago, Burlington and Quincy Railroad Company, has been duly considered by me, and herewith I submit a reply:

Chicago, Burlington and Quincy Railroad Company.

The facts upon which the question is based are presented in a letter of the Second Assistant Postmaster-General, addressed, on the 7th of July last, to the Assistant Attorney-General of the Post-Office Department, inclosed in your communication. They are, in brief, as follows:

The company above mentioned proposing to carry the mails over certain specified routes, from July 1, 1875, to June 30, 1879, compensation for such service was fixed, in accordance with the provisions of the act of March 3, 1873, at \$72,215 per annum, and accordingly contracts were sent out (October 14, 1875) to be executed by the company. On the 11th of January, 1876, the president of the company asked that *service* might be *recognized* without execution of contract, and on the next day an order was issued by the Postmaster-General to the Second Assistant substantially as follows: "Waive execution of contracts, and authorize Auditor of the Treasury for the Post-Office Department to pay the Chicago, Burlington and Quincy Railroad Company quarterly for carrying the mail, &c., at the rate of \$72,215 per annum, &c., until otherwise ordered, subject to fines and deductions." The Auditor thereafter made payments for the service performed by the company accordingly until an order was issued (October 16, 1876) to *abate the rate above specified 10 per centum*, in accordance with the provisions of the first section of the act of February 12, 1876. On the 6th of February, 1877, the blank contract which had been sent out for execution by the company, and whose execution had subsequently been *waived*, was returned signed by its then president, &c., and also *certified* upon the 3d of February, 1877. The Post-Office Department, however, refused to execute the paper, on the ground that the contract had by mutual consent been set aside.

The question made upon the above statement is, whether the company is to be considered as performing the service under *contract*, or merely by *recognition*—a determination of the point being important in view of the course in the Post-Office Department by which the provisions for deduction in the act of July 12, 1876, are considered not applicable to railroads performing service under a *contract* existing at the time of the passage of such act.

The phrase *recognized service* applies to cases in which the

Chicago, Burlington and Quincy Railroad Company.

Postmaster-General, instead of entering into executory contracts with mail carriers, delivers the mail to them, and settles the compensation for the service at the end of the quarter by *recognizing* it as done on behalf of the government.

I have considered the various provisions upon contracts for carrying the mail in sections 403, 404, 3941, *et seq.*, of the Revised Statutes, and am of opinion that they require executory contracts for that purpose *to be made in writing, signed by the contractor*. In general, contracts for that purpose (see also the universal policy upon public contracts in section 3709) must be made after due advertisement, and the requirements (express or implied) that contracts so made shall be in writing are frequent. The provision in section 3942 that contracts with railway companies may be made "without advertising for bids" is exceptional only *to that extent*. The policy of recognizing mail contracts to be in writing, and signed, does not turn upon the circumstance that they are based upon bids. It is evidently a *general* policy, that for reasons of administration operates upon most contracts made with the United States, and that, moreover, in instances like the present, accords with a similar rule as regards contracts *not to be executed until after a year or more* which prevails generally in commercial States.

This, of course, does not prevent the United States from being under obligation, *ex aequo et bono*, to pay for benefits *already appropriated by them in the absence of previous express contract*. That obligation is admitted here, and indeed is no more than a general expression for what in the present case is called *recognized service*. In such cases the parties transact business in confidence that when the labor has been done the United States will make *just compensation*. *Just compensation* is the measure of damages in all cases where no executory contract, or, what is the same thing, no *valid* executory contract has been made for the rate of compensation; and parties who have to adjust such compensation must, among other circumstances, *consider any statute in regulation thereof* in force during the time that the labor was being performed. In the absence of a contract fixing compensation, statutory definition of what is *just* must be applied whenever competent.

Chicago, Burlington and Quincy Railroad Company.

In my opinion the papers show that the parties did not intend to bind themselves by a *contract* (as distinguished from *recognized service*). Recognized service was the footing upon which they had been connected previously to July 1, 1875. At that date commenced the regular term for four-years' mail contracts in Illinois. Accordingly the Postmaster-General proposed to make a contract at a compensation determined by a recent reweighing of the mails carried by the company; and the usual contract in printed form was tendered to it. A short while afterwards its president applied to be allowed to go on under *recognized service*. Immediately thereupon an order, the substance of which is given above, was issued. Whatever is doubtful in the language of that order is to be explained by the context, *i. e.*, amongst other things, by the *application* to which it was in reply. This application was for *recognized service*. The order, taken alone, may at all events very well refer to such service; and therefore, *read as a reply*, does refer to it. For interpreting it we must bear in mind that it is language addressed in due order by one official of the United States to another for the purpose of regulating official conduct, and therefore is subject to all the contingencies which usually attend such communications, amongst others, that of being changed upon due consideration. It is not language of contract, or calculated to give rise to an estoppel *in pais*.

The following observations upon its language seem to be proper and pertinent:

As the *execution* was in law the *making* of this contract, nothing material can be argued from that form of expression. The phrase "unless otherwise ordered" refers to some future communication to either the *Auditor* or the *Second Assistant*. The word (*ordered*) suggests that such communication was to be to the former officer rather than to the latter, whilst other circumstances indicate that it was to be to the latter. But it is not important here to decide this matter. In the former case the order issued to the *Second Assistant* meant that *he* should *then* (it being just after the close of a quarter) and *thereafter*, at the close of other quarters, "unless otherwise ordered," *authorize* (see Revised Statutes, section 406 for the importance of this) the *Auditor* to pay the com-

Expenses of Witness.

pany at a specified rate, &c.; in the latter it meant that the *Auditor* should receive the *order* as continuing for other quarters besides the one just closed, "unless otherwise ordered." Whether the "waiver" mentioned in the order was also to be continued *subject to a future order* is immaterial, as at all events that state of things could not be ended, and by the order was not intended to be, except at the will of the party who allowed it, *i. e.*, the Postmaster-General.

As regards the rate of pay specified in the order, it is plain that the Postmaster-General assumed the power to give future instructions as to that; and as no previous contract prevented, such assumption was competent, not only as regards his official subordinates, but as to the carrier.

Upon the whole, I am therefore of opinion that the action of the Postmaster-General on the 16th of October, 1876, reducing the rates payable the Chicago, Burlington and Quincy Railroad Company for mail service was correct.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Acting Attorney-General.

The POSTMASTER-GENERAL.

EXPENSES OF WITNESS.

Expenses necessarily incurred by an officer of the Army as a witness for the Government in judicial proceedings before the civil authorities are allowable under section 850 Rev. Stat., and payable from the judiciary fund.

The prohibition in that section against the allowance of mileage applies as well to military as to civil officers who may be sent away on such service.

DEPARTMENT OF JUSTICE,
April 15, 1878.

SIR: I have considered the application of Second Lieut. T. A. Toney, Sixth Cavalry, to be reimbursed expenses incurred by him as a witness for the Government before the United States commissioner and the grand jury at Tucson, Ariz., which, with other papers relating thereto, was received under cover of your letter of the 12th ultimo.

The necessary expenses thus incurred may, in my opinion,

Claim of Charles M. Fairman.

be allowed him under section 850 of the Revised Statutes, and paid out of the judiciary fund; but in order to do this they must be "stated in items and sworn to, in going, returning, and attendance on the court." I think, however, that the prohibition in that section against the allowance of mileage applies as well to military as to civil officers who may be sent away on such service.

The papers mentioned are herewith returned.

I am, sir, very respectfully,

CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

CLAIM OF CHARLES M. FAIRMAN.

C. and F. borrowed from W. a flat-boat, to use in repairing a dredge-boat belonging to the United States, employed in improving the Ohio River. By direction of a subordinate officer of engineers the flat-boat was used in removing a wreck, the removal of which had been ordered by the engineer officer in charge of the Ohio River improvement, who, however, did not direct the flat-boat to be so used. W. subsequently brought suit against C. and F. for this unauthorized use of his property, and recovered judgment against C., the amount of which F. (being on the bail-bond of C.) was ultimately compelled to pay. F. claims reimbursement of the amount from the Government: *Held* that the payment by F. was in satisfaction of damages recovered for a private boat, in respect to which the United States was under no liability whatever; and that, even if it were a valid claim, it is not within the scope of the appropriation for the Ohio River improvement.

DEPARTMENT OF JUSTICE,

April 15, 1878.

SIR: I have examined the papers transmitted to me with your letter of April 6, requesting my opinion whether the claim of Charles M. Fairman can be audited and decided upon by the accounting officers of the Treasury, and whether any balance that may be found due him can be paid out of the appropriation for the improvement of the Ohio River.

The facts appear to be briefly these: E. J. Carpenter borrowed of one Wolf, of Pittsburgh, a flat-boat, to be used in connection with the repair of the United States dredge-boat

Claim of Charles M. Fairman.

Ohio, of which Carpenter was assistant engineer. While thus in possession of the flat-boat, by direction of Lieutenant Mahan, United States engineer, employed on the Ohio River improvement, Carpenter used her to assist in the removal of a wreck from the river and in transporting to Pittsburgh the machinery and cargo taken from the wreck. The removal of the wreck had been ordered by Colonel Merrill, the United States engineer officer in charge of the Ohio River improvement; but the direction to use the flat-boat emanated from Lieutenant Mahan.

Afterwards Wolf, the owner of the flat-boat, brought suit against Carpenter and Fairman for trover and conversion of the boat by this unauthorized use of her, in which suit they were both arrested and gave bail, Carpenter and Fairman executing the bail-bond as principals. Fairman had no connection with the matter, and when he executed the bond did so upon the statement of the then United States attorney for the district, who assured him that the Government would protect him against loss. At the trial, Fairman obtained a verdict in his favor, but judgment was rendered against Carpenter for \$874.78, from which an appeal was taken to the State supreme court, where the judgment was affirmed with costs, amounting in all to \$1,116.31, which Fairman, through his liability on the bail-bond, was compelled to pay. It is for this sum that he seeks reimbursement from the Government.

The payment made by Fairman was in satisfaction of damages recovered for a private boat, in respect to which the United States was under no liability whatever. As to the assurance of the United States attorney to Fairman that the Government would indemnify him against loss, it was made without any authority, as Fairman must have known, or must be assumed to have known. Fairman's payment of the judgment, therefore, did not make him in any sense a creditor of the United States; and consequently the auditing and allowance of this claim is, I think, clearly beyond the scope of the powers of the accounting officers of the Treasury, which are limited to the settlement of accounts between the Government and its creditors or debtors.

Even assuming Fairman to have a valid claim against the Government for reimbursement, I should consider the subject-

Claim of Charles M. Fairman.

matter of it as entirely beyond the scope of the appropriation for the improvement of the Ohio River.

The case is one of those in which the claimant can obtain redress only by an appeal to the justice of Congress.

The papers accompanying your letter are herewith returned.

Very respectfully, your obedient servant,
CHAS. DEVENS.

Hon. GEORGE W. McCRARY,
Secretary of War.

OPINIONS
OF
OFFICERS OF THE DEPARTMENT OF JUSTICE
*APPROVED BY THE ATTORNEY-GENERAL.

DUTY ON CHICORY-ROOT.

Under section 2504, Rev. Stat., which imposes a duty of one cent per pound on "chicory-root, ground or unground," and five cents per pound on "chicory-root, burnt or prepared": *Held* that "chicory-root, ground" (though burnt previous to being ground), is liable to a duty of one cent a pound.

DEPARTMENT OF JUSTICE,
May 17, 1875.

SIR: At the instance of the Attorney-General, I have considered your communication of the 11th instant and its inclosures, relating to the duty upon "ground chicory-root" under the provisions of the Revised Statutes, section 2504, (p. 478,) and herewith I submit my opinion thereupon.

The paragraph in question, so far as pertinent, is as follows:
"Chicory-root, ground or unground, one cent per pound;"
"chicory-root, burnt or prepared, five cents per pound."

The difficulty as to construction arises from the fact, stated by you, that chicory-root cannot be ground without having been previously burnt.

The former clause of the passage above quoted from the

* NOTE.—Section 358 of the Revised Statutes provides as follows: "Any question of law submitted to the Attorney-General for his opinion, except questions involving a construction of the Constitution of the United States, may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom the same may be referred. If the opinion given by such officer is approved by the Attorney-General, such approval, indorsed thereon, shall give the opinion the same force and effect as belong to the opinions of the Attorney-General."

"Sawed Timber" and "Sawed Lumber."

Revised Statutes is a reproduction of the provisions of the customs act of June 6, 1872, (17 Stat., 231.) The latter clause was not contained in the revisal reported to Congress by the commissioners, (vol. 1, p. 1203,) but was inserted after the work had left their hands.

It seems plain that where an article is included, as an object of taxation, within various provisions of a revenue act, such provisions imposing different taxes thereupon, if the description of such article in one provision be more specific than in another, such former provision is that which is to be enforced. Here the description in the former clause, viz: "chicory-root, ground," is absolutely precise as to the article now under consideration. Such clause, therefore, is entitled to preference of application as to that article, in a conflict between it and some other clause, the description in which, by deduction or otherwise indirectly, is found to mean the same thing.

Supposing, however, the above clauses to contain equally specific descriptions of the article, we have a case before us coming under a well-known principle for construing contradictory tax acts, viz: that where, after all has been said that can be, doubt remains as to the extent to which the legislature intended to tax an article, such doubt is to be resolved in favor of the tax-payer. (*United States vs. Isham*, 17 Wall., p. 504.)

I therefore am of opinion that under section 2504 of the Revised Statutes "ground chicory-root" is liable to a duty of only one cent per pound.

With great respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

EDWARDS PIERREPONT.
— — —

"SAWED TIMBER" AND "SAWED LUMBER."

By act of March 2, 1861, section 20, a duty of 20 per centum *ad valorem* was laid on "sawed timber"; and by act of June 6, 1872, section 1, a certain duty per thousand feet was imposed on "sawed lumber." The

"Sawed Timber" and "Sawed Lumber."

Treasury Department construed the latter provision to supersede the former. Both provisions were, however, subsequently re-enacted in section 2504 Rev. Stat: *Held* that the construction of the Treasury Department was correct, and that the mere bringing forward into the Revised Statutes of the two provisions has not changed the previous state of the law.

Sembler that the original dates of the provisions of the Revised Statutes must be considered in determining their effect upon each other, and that a previous decision of a court or a Department based upon the circumstance that one such provision is an earlier, and the other a later, expression of the will of Congress, binds as much as ever.

DEPARTMENT OF JUSTICE,

June 19, 1875.

SIR: Yours of the 8th instant, addressed to the Attorney-General, in reference to the duty on timber sawed and that on sawed lumber has been considered.

The question arises in construing the 2504th section of the Revised Statutes, which has brought forward (p. 473, Sched. K) from the act of 1861 a paragraph levying a tax of 20 per cent. ad valorem upon timber sawed, and from that of 1872 another paragraph levying a different tax upon sawed lumber.

Before the enactment of the Revised Statutes, Secretary Boutwell had decided (December, 1872) that upon this point the act of 1872 had superseded that of 1861, *i. e.*, in effect that sawed lumber in the latter and sawed timber in the former meant the same thing.

I understand that the circumstance that both provisions have been brought forward into the Revised Statutes has occasioned a doubt whether that decision should be followed hereafter.

I submit for your consideration that if the Revised Statutes, by so bringing forward the above paragraph, has changed the previous condition of legislation upon these topics, then you are not under any obligation by the act of March 3, 1875, referred to in yours of the 8th instant, to ask the concurrence of the Attorney-General in your conclusions as to the present duties upon the articles above mentioned; as in such case the exact question before you has never been heretofore passed upon by a Secretary of the Treasury.

If, however, the state of the law is the same now as in

"Sawed Timber" and "Sawed Lumber."

December, 1872, inasmuch as the question whether sawed timber and sawed lumber in the customs act above cited mean the same thing exactly is a mixed question of fact and law, for the ascertainment of the former element in which I have no special facilities, it is a matter which seems to me to be so doubtful that I do not feel warranted in advising that the former decision be overruled.

I apprehend that the mere bringing forward into the Revised Statutes of the paragraph from the act of 1861 above mentioned has not changed the previous state of the law. Without proposing to lay down a theory in regard to the effect of the Revised Statutes upon the legislation in force at its adoption, it seems to me that one rule must be, that the original dates of its provisions are to be considered in determining their effect upon each other; therefore, that a previous decision of a court or a Department based upon the circumstance that one such provision is an earlier and the other a later expression of the will of Congress binds as much as ever. Although changes plainly expressed in revisions of statutory law are to have due effect given to them, yet it is a rule of interpretation that mere changes of phraseology, &c., have no effect (Sedgwick on Statutory and Constitutional Law, p. 428), because "revision" by itself does not suggest the idea of change. In the present instance, the commissioners (and following them Congress) would probably include in the Revised Statutes all provisions which they were not sure had been repealed by later provisions.

This seems to be suggested by the words of the act of 1866 (14 Stat., 74) which created the commission. It authorized them only (section 1) "to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make their final report," and to that end (section 2) "to bring together all statutes and parts of statutes which from similarity of subject ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." It will be observed that the alterations

"Sawed Timber" and "Sawed Lumber."

therein authorized direct the attention of the commissioners not to the law, but to the text, *i. e.*, as I understand it, to the class of alterations commonly called clerical. And although in considering the Revised Statutes we must not forget that it is at least the work of a body (Congress) having full power to change the law at its pleasure, yet where there is doubt whether a change has been made, it is also to be observed that in section 5505 Congress declares that "the foregoing seventy-three titles embrace the statutes, &c., as revised and established by commissioners appointed under an act of Congress," *i. e.*, in effect as revised, &c., by commissioners not authorized to change the law. There may be cases where substantial changes of language leave no doubt that the law has been changed, but I think that the general presumption is otherwise, and that this presumption prevails where, as here, the only argument in favor of change is the reproduction of a provision which theretofore had not been expressly repealed, but had been, as it were, evacuated by a later provision, which latter is also reproduced.

I incline to think that the decision of December, 1872, is correct. The statute of 1872 provides for both sawed lumber and timber squared or sided. The question is, what room is left for timber sawed? Admitting the suggestion that timber is to be confined to the larger descriptions of lumber, and bearing in mind that the act of 1872 expressly includes "deals" in the term lumber, what distinction is to be taken between "timber squared or sided" on the one hand, and "timber sawed" on the other, except that the former includes also timber hewn, this latter phrase being also specifically reproduced in the Revised Statutes? I observe that whilst wood was dutiable in Great Britain, it was denominated "wood and timber," (sec. 100, Statutes at Large, p. 78, &c., &c.) and in no case lumber. Indeed, the latter word does not occur (in the American sense) in any English book of reference that I have consulted. So, also, it does not occur in the United States customs act of March 2, 1861, ("timber" only being used,) or in any customs act before that of 1872. In the latter it is the term oftenest used, timber occurring only in the connections timber squared or sided.

Upon the whole, I repeat that I have found nothing, by

Mileage of Army Officers—Sea Travel.

reading or otherwise, which justifies me in advising that the former decision be overruled.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

EDWARDS PIERREPONT.

MILEAGE OF ARMY OFFICERS—SEA TRAVEL.

Under section 24, act of July 15, 1870, chap. 294, Army officers traveling abroad upon public business (their transportation not being furnished by the Quartermaster's Department, or on a conveyance belonging to or chartered by the United States) were entitled to mileage at the rate of 10 cents per mile for sea travel as well as for land travel.

The rule which forbids mileage for sea travel to naval officers under the second section of the act of March 3, 1835, chap. 27, does not apply to or govern questions of mileage to Army officers under the act of 1870.

DEPARTMENT OF JUSTICE,
July 6, 1875.

SIR: The facts upon which is based the question put by you to the Attorney-General, at the instance of the Second Comptroller of the Treasury, in a communication of the 28th ultimo, are briefly as follows:

In settling the accounts of Colonel Barnard and other Army officers, who, in the summer of 1870, had been ordered to Europe upon public business, the Second Comptroller of the Treasury, under the act of 1870, allows mileage at the rate of 10 cents per mile for land travel abroad, but rejects mileage for sea travel, allowing on the latter item only actual steamer fare.

The act of 1870, (chap. 294, sec. 24,) which has since been repealed, (by the act of 1874, chap. 285, sec. 1,) as to the matter before me, is in these words: "When any officer shall travel under orders, and shall not be furnished transportation by the Quartermaster's Department, or on a conveyance belonging to or chartered by the United States, he shall be allowed 10 cents per mile, and no more, for each mile actually by him

Mileage of Army Officers—Sea Travel.

traveled under such order, distances to be calculated according to the nearest post routes." (16 Stat., 320.) The act of 1874 allows thereafter only actual traveling expenses.

Colonel Barnard and the other officers referred to above, while the act of 1870 was in force, received from the regular officer mileage for both land and sea travel, and upon passing their accounts the question now is upon their obligation to refund.

This question turns upon a construction of the above statute, either by its words, or by a prolonged and uniform course of action in the office called upon practically to give it operation. That mileage is intended by Congress to repay actual expenses cannot affect the question, because the statute is in the same sense also a declaration that these expenses in every case where it applies actually amount to the mileage. In other words, in such case we cannot go behind the sum allowed by the statute and inquire into the actual expenditure. As the act is of a very late date, there could hardly exist a course of action sufficient to control plain language. In fact, as I understand from the paper inclosed with your communication, Colonel Audenried's case, decided on the 31st of July, 1874, is the first of the series.

There has, however, been a course of action in regard to a like class of claims under an act similarly worded, viz, claims by naval officers for mileage under the act of 1835, chap. 27, sec. 2, (4 Stat., 757,) which, after providing that certain allowances for such officers shall be all that shall be received by them, excepts allowances "for traveling expenses when under orders, for which 10 cents per mile shall be allowed." The course of action there, based on an order published by the Fourth Auditor in 1835, has, in regard to sea travel, allowed no more than actual expenses. After this lapse of time very high respect is due to that course of action, acquiesced in, or unsuccessfully resisted, as it has been by the very intelligent and influential class upon whose interests it has operated. Consideration is likewise due to it in analogous cases, it being proper that the accounts of the Government shall be kept upon some common principle; and something being due also to the presumption in such cases that a course of office becomes known to Congress, and therefore

Mileage of Army Officers—Sea Travel.

that like legislation in analogous cases is intended to produce like results, and that without reference to what, in reason, might properly have originally been the true practical construction.

Upon the best consideration that I can give to the opinion of Attorney-General Legaré, of October 19, 1842, (4 Opin. 95,) relied upon by the Second Comptroller, I do not think that the course of office as regards the above act of 1835 is sanctioned thereby. Mr. Legaré was not exceeded in point of professional accomplishment by any one who has ever been an officer of justice in the United States; but the opinion in question is a brief and familiar note to the then Secretary of the Navy, in which, after saying something for and something against the rule excluding foreign travel from the operation of mileage, he concluded with: "On the whole, however, my opinion is that subtle interpretations are to be avoided, and that you ought to call for a supplementary act to sanction the practice of the Department hitherto, and to establish it for the future." I can hardly be mistaken in gathering from that language that Mr. Legaré was of opinion in 1842 that what, as matter of law, the rule had to go upon was the fact that it had stood for seven years, and that it was fair, not as a deduction from the words of the act, but as a principle, to govern the law-makers themselves. Throughout his opinion runs an expression of the distinction which, as a lawyer, he was bound to take between those (as the Fourth Auditor) called upon only to expound law and those (as Congress) called upon to make it. In order to know what it was exactly that Mr. Legaré thought of the meaning of the act of 1835, we must divest the question submitted to him of all embarrassment arising from the practical construction already (in 1842) given to it. At present we are interested to know what he thought of the meaning of the words, not of the effect of the action by the Fourth Auditor, pursued uniformly for seven years. Upon that meaning he says, after conceding that circumstances went far to warrant the action of the office: "Yet were it *res integra*, the words of the act would not, according to any received rule of interpretation, admit of the construction thus put upon it and, it seems, uniformly acted on. The legislature meant, no doubt, more than it has said, and the

Mileage of Army Officers—Sea Travel.

Department has only done what the legislature meant, but *quod voluit sed non dixit.*" For Mr. Legaré to say that the Fourth Auditor had governed his action in such case by a *voluit*, of course divined by him, instead of by a *dixit* plainly set down, was a clearly expressed dissent from the principle upon which the latter had acted—a dissent repeated in the last sentence of his opinion quoted above. The opinion, therefore, is against the principle of the course of office in question. At the present time, a third of a century having passed since even Mr. Legaré's opinion, that course of office has acquired consistency enough to stand alone, and as to the rights of naval officers, under the act of 1835, would probably be deferred to by even the Supreme Court.

Let us inquire as to its exact bearing upon the act of 1870 in regard to Army officers. In Mr. Legaré's day the course of office was to confine mileage for naval officers to travel within the United States. He intimates a distinction in principle between foreign land travel and foreign sea travel, viz., that mileage for the former would be too little, and for the latter too much. "It is impossible that the legislature meant it to be applied to traveling by sea. I think it also improbable that it meant to confine rigorously to that sum the indemnity of officers traveling in foreign countries by order," &c.

When Mr. Legaré makes use of the strong language, "It is impossible," &c., is it not plain that he had before him the literal meaning of the words (above quoted) which gave to naval officers "traveling"—whether on Government or chartered vessels or not—ten cents per mile? There are no words in the act of 1835 answering to those in that of 1870 which exclude from mileage cases where a "conveyance belonging to or chartered by the United States" is employed. Literally it authorized mileage in all such cases. A very large proportion of the duty performed by naval officers at sea is done whilst "traveling" in some form or other. The word "impossible" from the disciplined lips of Mr. Legaré applies, no doubt, to the notion that Congress meant to give mileage for all traveling under orders by naval officers, and, so taken, it is properly balanced against the word "improbable" for the hypothesis stated in the next sentence. I will not imitate the

Extradition—Lawrence's Case.

error ascribed to Mr. Legaré by saying that it is impossible that he should have distinguished, by all that separates the improbable from the impossible, cases so much within a measuring cost as those of the cost of sea travel and the cost of foreign land travel, but such an intention upon his part seems wholly improbable.

Upon the whole, I feel assured that Mr. Legaré meant that naval officers were not, however general might be the words of the act of 1835, to receive mileage for all traveling upon that element, to travel upon which was a great part of that duty for which their regular pay was given. I have no doubt that if he had been called upon by the Secretary of the Navy to devise a scheme for administering that act more intelligent and discriminating than the rule before him, he could easily have done so, saving thereby both the words and the wisdom of the legislature of 1835; but, as the rule in existence had been some time in force, he contented himself by referring the Department to Congress.

I therefore am of the opinion that the rule forbidding mileage for sea travel to naval officers under the act of 1835 does not apply to the question whether Army officers are entitled to such mileage under the act of 1870.

And so, the matter before me being *res integra*, I conclude that Colonel Barnard and the other Army officers referred to in your communication are, by the plain words and meaning of the act of 1870, entitled to the allowances claimed by them.

Very respectfully, your obedient servant,
S. F. PHILLIPS,
Solicitor General.

The SECRETARY OF WAR.

Approved.

EDWARDS PIERREPONT.

EXTRADITION—LAWRENCE'S CASE.

L., a naturalized citizen, having fled the United States, was arrested in Ireland at the instance of this Government, and extradited, under the treaty of 1842 with Great Britain, upon the charge of forgery. The extradition proceedings occurred in the spring of 1875, under the British act of 1870. Upon being brought back to this country he was arrested

Extradition—Lawrence's Case.

upon bench warrants issued by a United States circuit court, based on charges of other offenses committed before his surrender, and he has since also been served with a *capias* issued by the same court in a civil suit brought by the United States to recover a debt due prior to his surrender. Immunity from prosecution in any civil action, or for any offense other than that for which he was extradited, being claimed by him—upon the following grounds mainly: (1) that such immunity is provided for by the British act of 1870, under which the extradition proceedings took place; (2) that the immunity arises by implication out of the treaty of 1842 alone; (3) that it is conceded by section 5275 Revised Statutes—he petitions the Executive to instruct the proper officers not to prosecute further the civil suit against him, nor any criminal proceeding against him for an offense other than that for which he was extradited, and that he be discharged from arrest under the said bench warrants: *Advised* that section 5275 Rev. Stats. has no application to the present case; that, by force of section 27 of the British act of 1870, in all cases of difference between that act and the treaty of 1842, the treaty controls, and hence the immunity claimed here must be referred to that treaty considered alone; that this claim for immunity is not warranted by the said treaty; and that no ground has been laid by the petitioner entitling him to the instructions asked for.

DEPARTMENT OF JUSTICE,

July 16, 1875.

SIR: I submit for your consideration the following opinion upon the petition of Charles L. Lawrence, referred to me under your direction by the Attorney-General on the 21st of May.

The case stated for your interposition is as follows:

The petitioner is a naturalized citizen of the United States, who, having departed from this country without intending to return, while on his way was arrested in Ireland during the month of March, at the instance of this Government, under the treaty of 1842; and, after due proceedings, was extradited, and in consequence thereof is now in the city of New York in jail. The only charge against the petitioner that was considered in the extradition proceedings was that he had forged the name of one Blanding to a certain bond and oath of entry in the New York custom-house.

The proceedings for extradition were under the British act of 1870.

Immediately upon his arrival in New York the petitioner was arrested, under bench warrants issued out of the circuit court of the United States for the southern district of New

Extradition—Lawrence's Case.

York, upon charges of other forgeries, of conspiracy, &c., that had been committed before his extradition; and since such arrest a *capias* in a civil action, sued out of the same court, for unpaid duties owing to the United States before his extradition, has been served upon him.

Copies of the above-mentioned warrants, &c., are appended to the petition—the civil *capias* being in assumpsit for \$1,386,400 on account of unpaid duties.

The petitioner says that he is advised that his "surrender by the British Government as aforesaid was made, and by arrangement with the Government of the United States was accepted, subject to the provision of the said act of 1870, which in substance declares that your petitioner shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the United States for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender was granted; and therefore he prays for instructions to the proper officers not to prosecute him further in such civil suit or for any other crime than the identical one upon which he was surrendered, and that he be discharged from arrest under said bench warrants," &c.

The important question presented by the petitioner, therefore, is as follows: Supposing a fugitive criminal to have been extradited in April, 1875, from Great Britain to the United States under the treaty of 1842 and by proceedings taken under the British act of 1870, does the latter Government recover jurisdiction over him in respect of any act, whether civil or criminal, done before such extradition, other than the criminal act for which he was surrendered?

Unless under very special circumstances, such a question in the United States is, in its nature, *legal* and not political. In other countries this is not so. But here, inasmuch as extradition is generally regulated by treaty, and as treaties are of themselves a part of the "supreme law," questions as to the effect of extraditions already accomplished are ordinarily questions of law. Questions of law cannot be determined practically in civil cases except by the courts in which they are pending. Such questions, however, in criminal cases pending in courts of the United States, may receive a prac-

Extradition—Lawrence's Case.

tical determination at the hands of the President by an order forbidding them to be further prosecuted.

If the petitioner had been surrendered by the British Government because of irregular practices by the agents in his extradition, whereby that government had been misled, a question like the above might become political in its nature, and therefore cognizable by the Executive. Such practices may be included in the suggestions as to "an arrangement," made in the petition, although I suppose those suggestions to refer, at least mainly, to some contract binding the United States, and supposed by the petitioner to be authorized by the British extradition act of 1870.

If, therefore, the petitioner has been surrendered because of conduct upon the part of the agents in his extradition not authorized by treaty, and yet involving the United States in point of good faith and honor as its guarantor, I suppose that it is the political department of the Government that must give effect to such guaranty in all suits that may be brought against him. (See Scott's Case, 9 Barn. and Cress., 446.) But if the immunity claimed by the petition be derived from a treaty, either taken alone or as modified by a statute of the United States, or an act of Parliament required to enforce it, it seems that its existence for practical purposes is to be determined as to the civil action of which he complains only by the court in which that action is pending; while as to the criminal cases it may be determined either by such court or by the President. However, the President never interferes with a prosecution unless the question made by the defendant is plainly one which will be decided in his favor by the court as soon as a trial can be reached. If there be doubt about that, the Executive leaves it to the judiciary, where such questions more properly belong.

Upon the evidence in the case made by the petitioner no political question whatever arises. There is a total absence as well of proofs as of probability in favor of the suggestions tending in that direction.

The petition placed the claim of Lawrence to immunity simply upon the allegation that it is expressly conferred by the British extradition act of 1870, under which were had the proceedings in his case at London. Other grounds, however,

Extradition—Lawrence's Case.

are taken in the learned and well-considered briefs which have been filed in his behalf, to wit: (1) that such immunity exists in the very nature of extradition under the treaty of 1842 alone; (2) that it is conceded by the United States statute of 1869, chap. 141, (Revised Stats., sec. 5275;) and (3) that certain conduct of those who represented the United States in the proceedings for extradition has pledged the Government to allow that immunity.

I have already dealt with the last of these suggestions; but I repeat that there is no evidence of such conduct, or of any corresponding impression having been received by the British Government, or by any of its officials. I have read the proceedings. They took place before Sir Thomas Henry, a distinguished magistrate, (and eminent authority in matters of extradition,) who is credited with having had much to do with framing the act of 1870. Both the United States and the petitioner seem to have been well represented by counsel, the former by Richard Mullens, esq., a prominent member of the English bar, whose special learning in extradition law was recognized by his being called in 1868 to testify before the special committee appointed by the House of Commons to examine and report upon the state of the law of extradition, and also to advise amendments thereto. During those proceedings nothing occurred beyond the ordinary routine in extradition cases. Whether anything of the sort suggested by the petitioner is to be implied from the fact that those proceedings were under the act of 1870 will be examined hereafter.

It is quite as plain that there is nothing pertinent to the claim of the petitioner in the provisions of the United States statute of 1867, chap. 141, sec. 1, (Revised Stats., sec. 5275,) which is in these words:

“ Whenever any person is delivered by any foreign government to an agent of the United States for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and

Extradition—Lawrence's Case.

until his final discharge from custody or imprisonment for or on account of such crimes or offenses and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or the militia thereof, as may be necessary for the safe-keeping and protection of the accused."

A simple perusal of this act is enough to show that it has no application, direct or indirect, to the case of the petitioner. It certainly intimates that extraordinary attention by the Executive to the party extradited may properly be given, until his final discharge on account of the crime for which he was surrendered, and for a reasonable time thereafter; but attention to what end? The statute answers—to the end of his "safe-keeping," *i. e.*, keeping safe from escape or rescue; and also of his "security against lawless violence", *i. e.*, against mobs or the like. If Congress had intended that the party surrendered should be free during such time from also the ordinary action of the courts, this would have been the place to express it. Their silence is significant.

The above remarks leave for consideration the two principal suggestions by the petitioner: 1, that the British act of 1870 has so qualified the treaty of 1842, in practice, as to confer the immunity claimed upon all who are surrendered by means of its machinery; or, 2, that such immunity arises by necessary implication out of the treaty alone.

At the outset I remark that the act of 1870 has no bearing whatever, for the past or the future, upon civil suits brought for causes of action existing previously to the surrender. Its application in any case is to "offenses" only. Therefore the suit brought by the United States for unpaid duties will not be further considered under the present topic.

I. In Great Britain a treaty of extradition is not of itself law, but requires legislation to give it effect. Before 1870 the treaty of 1842 was rendered effective by acts that were repealed by the act now under consideration, and since then the latter act has been the only one giving it effect. After resorting to that act in order to secure an extradition, of course the United States will give effect to any conditions which it imposes. The importance of ascertaining its meaning is therefore conceded. That act is one of universal appli-

Extradition—Lawrence's Case.

cation, intended to supply for all extradition agreements, past or to come, the place of the special acts for each treaty theretofore in use. It refers to such agreements by the terms, arrangements and treaties; the former is the term usually employed, the latter occurs only in the twenty-seventh section. While this act was upon its passage through the House of Commons, the attorney-general, (Collier,) who was partly in charge of it, stated that the word "arrangement" was used to include not only treaties, but future agreements for extradition less formal than treaties. (Hansard, vol. 202, p. 305.) Theretofore extradition had been provided for only by treaty. The act affords a definition of the word "arrangement," in some respects, which is sufficient for our purposes. It is an agreement for extradition that at all events must have gone before the proceedings which it authorizes, and have been published in an order in council. The fact that proceedings were taken under the act of 1870, therefore, cannot, as is suggested by the petitioner, either amount to an "arrangement" or have impressed British officials with the belief that there had been an "arrangement."

Again, the act of 1870 is divided into parts; one relating to future, and the other to past, agreements for extradition. Except for the twenty-seventh section, the act would not apply to the treaty of 1842. As is usual in recent British legislation, it contains a section defining certain terms used therein. One portion of its definition of "fugitive criminal" is, a person accused of an "extradition crime"; and it defines "extradition crime" to be one of the crimes described in the first schedule to this act. I call attention to these definitions for the purpose of showing that the provisions of the act (other than in the twenty-seventh section) are predicated upon the existence of relations betwixt Great Britain and the foreign state which avails itself of or is bound by them, that entitle the latter to ask for a surrender on account of any of the nineteen crimes mentioned in the first schedule, whenever it becomes bound to recognize the immunity now claimed by the petitioner; that is, excluding as yet all consideration of its twenty-seventh section, this act has no application to the relations of the United States and Great Britain, because these are relations for the surrender of fugitive criminals on

Extradition—Lawrence's Case.

account of the seven crimes of the treaty of 1842, and not on account of the nineteen crimes of the act of 1870. Except for the twenty-seventh section, proceedings for extradition by the United States would have continued to be under the acts previously passed to enforce the treaty of 1842.

Take, for example, the clause specially relied upon by the petitioner, viz: "A fugitive criminal shall not be surrendered unless provision is made by law or arrangement that, until he has been restored or had an opportunity of returning to Her Majesty's dominions, he shall not be detained or tried for any offense committed prior to his surrender other than the extradition crime." Under the definitions of the terms "fugitive criminal" and "extradition crime" alluded to above, is it not evident that this clause does not apply to the case of one whose character as a fugitive depends not upon the first schedule of the act of 1870, but upon the tenth article of the treaty of 1842 ? So, in the second section of the act, by which its provisions are confined to cases where an arrangement has been made for the surrender of "fugitive criminals," if the definition be applied to that term, it is apparent that cases in which the first schedule does not apply do not, under its general provisions, come within the act.

The twenty-seventh section therefore is of great importance in this discussion. After expressly repealing the acts which theretofore gave effect to the treaty of 1842, that section provides as follows: "And this act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the act so repealed) shall apply as regards crimes committed either before or after the passing of this act in the case of the foreign states with which these treaties are made." That is, in applying the previous parts of the act to (say) the treaty of 1842, this section omits from such application anything in the act inconsistent with the treaty. In other words, the immunity claimed by the petitioner must be referred to the treaty considered alone, inasmuch as in all cases of difference between them the treaty controls the act and not the act the treaty.

It is not too much to say that this is as it should be; for, admitting the power of Great Britain by an act passed in 1870 to change a treaty contract made in 1842, it is not pleas-

Extradition—Lawrence's Case.

ant to conclude that such power has been exercised; for in such case the change has been made without notice to the United States; a circumstance which, in connection with the treaty of 1842, (expressly providing as that does for its own avoidance by short notice from either party,) might involve not only a want of courtesy towards the United States, but a want of that perfect good faith which the petitioner very properly desires to be observed by the United States towards Great Britain. There has been in this case no want of perfect good faith upon the part of either Government, or upon that of the officials of either; but it is apparent that, if the case of legislation by Great Britain and of proceedings by the United States had been as conceived by the petitioner, reclamations by the former Government against the latter on the score of ill faith might be attended with special complications.

The view taken above as to the twenty-seventh section is confirmed by the language of the Court of Queen's Bench in Bouvier's case, (27 Law Times Rep., 844; 42 Law Journal Rep., common law, 17; 12 Cox Cr. Cas., 303.) Bouvier was a French fugitive, demanded in 1872 under the extradition convention of 1843 between France and Great Britain, effect to which had, before 1870, been given by the same acts that had given effect to the treaty of 1842. The convention contained no clause granting immunity, but the proceedings against him had been taken under the act of 1870. The case therefore is so far on all fours with the present. During the proceedings (in the Island of Jersey) a suggestion by the fugitive that upon surrender he might be tried in France for old offenses other than the extradition crime, was met by proof that by the French domestic law he could be tried only for that crime. In the Queen's Bench the attorney-general, (Coleridge,) who represented the French Government, on that part of the case relied not only on the above proof, but also greatly upon the point that that restriction upon jurisdiction over fugitives did not, by the twenty-seventh section, apply to the convention with France. The proof rendered it unnecessary to decide the latter point, as in either event Bouvier would be surrendered, but the court (Cockburn, Blackburn, and Mellor) conceded that Parliament had in-

Extradition—Lawrence's Case.

tended so to provide, and inclined to think that their words had effected such purpose. They however suggested further legislation to clear up the doubt; but, although an amendatory act has since been passed, that point was left untouched. We may suppose that the attorney-general, as member of Parliament, differed with the judges upon the necessity of amending language which, as one of the introducers of the bill, he had probably closely considered in 1870. Indeed, it seems that if that language was sufficient to draw from the lord chief justice the expression, "I see plainly that was the intention of the legislature; that is to say, it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full force and effect," (Bouvier's case, L. T., p. 846,) it is sufficient for all purposes.

The earnestness with which the distinguished counsel for Lawrence has pressed the suggestion that what the court in Bouvier's case were in doubt about was, whether the convention with France had not been abrogated entirely, and not whether it had been saved in its full force and effect, renders it necessary to say that this cannot be so; because Bouvier was demanded under the convention, and the court had no hesitation in ordering his surrender. To make his surrender possible, it was necessary not only that there should be a machinery act like that of 1870, but also a treaty, or an arrangement authenticated by an order in council. The report states that there was in existence no other convention for extradition on which the surrender could be based.

I conclude that the British extradition act of 1870 has no bearing upon the question raised by the petitioner.

II. I come now to consider whether the treaty of 1842, taken alone, warrants the petitioner in his claim for immunity.

It is not contended that the treaty confers that immunity expressly. As is well known, the extradition provision therein is one of great simplicity, and specifies no more than that the two Governments will thereafter, upon due requisition, mutually "deliver up to justice all persons who, being charged with the crimes of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of

Extradition—Lawrence's Case.

either, shall seek an asylum or shall be found within the territory of the other."

Therefore the only question remaining is whether, when the treaty was made, the parties thereto understood that after surrender fugitives would be liable only for the crime made out in the proceedings therefor. Such understanding might appear in the correspondence between the negotiators of the treaty, or the debates in Congress and Parliament, or in subsequent action by courts in cases affecting persons surrendered.

No reference to the present topic is contained in such correspondence or debates, or, as I am informed, in any subsequent diplomatic correspondence between the two Governments; and the decision of the courts in the two countries, so far as they can be traced, are (without an exception) to the effect that fugitive criminals are not entitled to such immunity.

It is to be remarked that the language of the treaty is probably that of the American negotiator, Mr. Webster, a gentleman familiar with the practice in cases of surrender of fugitives from justice between the States, and desirous that, as to the offenses named in the treaty, that practice should be extended especially to fugitives escaping beyond the long neighboring Canada line. The simple pregnant expression in the treaty requiring fugitives to be delivered "*to justice*," neither more nor less, was probably suggested by the parallel expression in the Constitution, which describes those who are to be surrendered between the States as those who flee "*from justice*." The opinion of Judge (afterwards Mr. Justice) Nelson in *Williams vs. Bacon*, 10 Wendell, 636, expresses briefly what I believe has been the uniform American doctrine upon this subject. In that case a fugitive had been surrendered by Massachusetts to New York on a charge of obtaining goods by false pretenses. After surrender he was arrested in a civil suit. On moving for his discharge from arrest, as being a breach of public faith, his counsel said:

"On the requisition of the governor of this State he has been delivered up by the governor of another State to answer to a criminal charge, not to be subjected to arrests here on civil process."

Extradition—Lawrence's Case.

To this Judge Nelson said :

"There is no pretense that the criminal proceeding in this case was a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him civiliter. The argument of the defendant's counsel in this particular is not supported by the facts of the case. Had such facts appeared, the defendant would have been discharged. As it is, the motion is dismissed with costs."

I believe that it will not be disputed that, according to American international law, fugitives from justice, when *bona fide* returned to justice, are returned to it without any qualification arising out of the fact that they had almost succeeded in committing a fraud upon its jurisdiction by flight. I say when returned *bona fide*, because it is beyond doubt that no jurisdiction can arise in case the government which made the surrender has been induced to do so by deceit. I will add that the recognition of the above rule of jurisdiction in the relation of so many intelligent, well-ordered communities affords a strong presumption that it is not immoral or in any sense contrary to first principles, and also that as the relations between foreign governments become more and more free from collateral obstructions, (one of which I shall mention before I conclude,) this will become more and more the rule in all extraditions.

The cases in which American courts have held that persons surrendered under the treaty of 1842 were liable for other offenses than the extradition crime are those of Caldwell (8 Blatchford, 131) and Barley (Clark on Extradition, 2d ed., p. 90, n.; also, Report of British Extrad. Comm. 1868, pp. 53 and 60.) In *Adriance v. Lagrave*, (American Law Register, May, 1875,) the court of appeals of New York held the same doctrine as to a fugitive arrested in a civil suit, although the extradition was discredited as having been "ostensibly" for a crime.

The above are the only American cases on this subject which I have met; that of *Sanford v. Chase*, 3 Cowen, 381, cited by the petitioner, is not in point.

Resting upon the above uncontradicted practice and decisions as proof that it is the universal understanding of the authorities in the United States that fugitives when surren-

Extradition—Lawrence's Case.

dered to justice, without more being said, are surrendered thereto generally, absolutely, and simply, I will now inquire whether the British doctrine differs therefrom.

The special extradition committee of the House of Commons, referred to above, consisted of eighteen persons, amongst whom were some of the most distinguished public men of the empire, viz: Messrs. Bouverie, Layard, Walpole, W. E. Foster, Stansfeld, J. S. Mill, Sir Francis Goldsmid, Sir R. P. Collier, and the solicitor-general. Their labors issued in the enactment of the law of 1870. In order to obtain particular information upon the topic of extradition, they summoned before them and examined as experts Sir Thomas Henry, E. A. Hammond, (the permanent under secretary of state for foreign affairs,) Mr. Mullens, and others. I have looked carefully through the proceedings and report of the committee. The evidence taken by them is reported at length. At the time of his examination Mr. Hammond had been in public office continuously for forty-five years, and had been under secretary since 1854. I think that it must be conceded that any statement by him of the English view of the matter, especially when acquiesced in by the eminent men, of various shades of political belief, before whom it was made, must be accepted as correct. Mr. Hammond called the attention of the committee to Burley's case (cited above) as one in which an American court had proceeded to put a fugitive surrendered by Great Britain upon trial for an offense other than the extradition crime, and stated that whilst it was pending the matter had been referred to the law officers of the Crown, and that they had held that he might be so tried. At another point he expresses his own personal opinion as being to the same effect. (Questions 1032 and 206.) The former passage in his evidence is as follows: "The question was referred to the law officers in this country, and it was held that if the United States put him *bona fide* on his trial for the offense in respect of which he was given up, it would be difficult to question the right to put him upon his trial also for piracy or any other offense which he might be accused of committing within their territory, whether or not such offense was a ground of extradition or even within the treaty." No exception was taken to either statement, although several

Extradition—Lawrence's Case.

members of the committee made remarks thereupon. I suppose that the requirement therein of a previous *bona fide* trial for the extradition crime is due to the circumstance that the case submitted went upon that hypothesis, in which event, of course, the opinion would conform to such special feature. It seems plain, inasmuch as the *bona fides* of the extradition is the important matter, that, in the absence of a treaty rendering a certain sort of evidence thereof exclusively admissible, any pertinent evidence is competent. A previous trial is plain and high, but not the only, evidence of *bona fides* in the previous proceedings for extradition.

In the minutes of the committee it is also stated that one Heilbroun, having been surrendered by the United States to Great Britain for forgery and acquitted thereof, was afterwards put upon trial by the latter for a larceny committed at the same time, and was convicted. (Question 1152, &c.) Paxton's case, in Canada, is to the same effect. My attention has been called to these and some of the cases cited above by Mr. Clarke's Treatise on Extradition.

A moment's attention to the argument in Bouvier's case (above) will shew that the court assumed that, previously to the act of 1870, the French treaty of 1843 [and so of course the American treaty of 1842] sanctioned trials for offenses previous to surrender other than the extradition crime.

I understand these cases to be uncontradicted in Great Britain, and therefore that the executive and judicial authorities of that Government agree with those of the United States in pronouncing against the existence of the immunity claimed by the petitioner under the treaty of 1842 considered alone.

Upon the whole I am of opinion :

I. That as there has been no promise or conduct by any person who represented the United States in the proceedings for the petitioner's extradition which modifies the operation of the treaty upon his present condition, that condition is here a question of law, not of policy.

II. Therefore, that the President cannot interfere in the civil suit pending against the petitioner ; and

III. That no ground has been laid for an order to discharge the petitioner from further prosecution upon the criminal matters specified in the petition.

Extradition—Lawrence's Case.

Inasmuch as, according to the views of this Government, extradition is wholly a matter of positive international law, I have confined the above discussion to the relations actually existing betwixt the United States and Great Britain. I have therefore omitted to remark upon the French domestic regulation of 1841, by which this immunity is provided for fugitives extradited to France. For the same cause it seems unnecessary, except incidentally, to refer to the circumstance that the similar feature in the British act of 1870 is due, not to a conviction that it is proper in itself, but to a desire to prevent all chance that a fugitive may be demanded for one offense and then tried besides for an offense in its nature *political*. (Hansard, vol. 202, p. 302, Report Extrad. Comm., Question 666, &c., &c.)

The reason for inserting so sweeping a provision to effect an object so limited may be gathered from the minutes of the committee of 1868. Briefly stated, it is, that as nations differ upon what constitutes a political offense, the benefit of the British view thereupon can be secured to fugitives only by providing that they shall be triable for no offenses except such as have been previously scrutinized by British officials.

The provision of 1870 is therefore, so to say, collateral, and announces no general principle in international law.

As the general ideas of government and justice which prevail in Great Britain and the United States preserve the likeness due to a not remote common origin, nothing, either past or apprehended, has suggested to either party the propriety of putting an end to the extradition agreement of 1842 by notice, as provided in the eleventh article of the treaty. This would be a natural and easy step towards the introduction of a stipulation like that in the act of 1870. As regards each other, therefore, these powers prefer the agreement of 1842 to the one last mentioned, which, however, each of them has of late adopted in arrangements with some other States. Until something has occurred to render either of these powers apprehensive that political offenders cannot be protected against the other unless by restricting jurisdiction to the extradition crime, the rule of the treaty of 1842 will probably remain in force. In the meantime, that upon a proper occasion the Government of the United States will either suggest or will

Obstruction to Navigation.

consent to such a restriction, is shown by its recent treaties with Italy, 1867, and Nicaragua, 1868. (Statutes at Large, vol. 15, p. 629, and vol. 17, p. 815.)

I am, sir, very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The PRESIDENT.

NOTE.—The Attorney-General, previous to his appointment, had been consulted with professionally in behalf of the petitioner in the above case, and for that reason took no part in advising the President upon the matter submitted by him. In connection with the foregoing opinion of the Solicitor-General, see the case of *United States vs. Lawrence* (13 Blatch. C. C. R., 295,) the defendant there being the same person whose petition is considered in that opinion.

OBSTRUCTION TO NAVIGATION.

In the absence of legislation by Congress upon the subject of the improvement of the harbor of Saint Louis, or of the navigation of the Mississippi River at that point, no one is authorized to institute judicial proceedings in behalf of the United States against the city of Saint Louis for the abatement as a nuisance of the Bryan street dike, constructed by that city in said river.

The anticipation that, should such legislation hereafter be adopted, the dike will be an obstacle, is no ground for interference.

DEPARTMENT OF JUSTICE,

October 11, 1875.

SIR: In the matter of the obstruction to the Mississippi River at Saint Louis by the "Bryan street dike," referred to in yours of the 26th of June last, I understand the facts to be as follows:

1. As part of a plan for improving the wharves of Saint Louis, this dike has been constructed by order of the city, extending 700 feet into that part of the river channel which lies within its own limits.
2. The navigation of the river has not been injured thereby.
3. The current of the river has been turned against the Illinois shore, and a considerable portion washed away.
4. Up to the present time no plan for the improvement of the harbor of Saint Louis has been adopted by the authorities of the United States, although the board of engineers

Branding Cigar-Boxes.

have under consideration, and are inclined to recommend, a scheme which, if hereafter adopted, will have been rendered more difficult and expensive by the effects of the dike above mentioned.

The question is, whether under the above state of facts the United States can obtain an injunction against and abatement of the dike?

In my opinion, under the existing absence of legislation upon this subject, no one is authorized to take such action on behalf of the United States.

It is expressly stated by Colonel Simpson (May 22, 1875) that the general navigation of the river has not been and probably will not be injured; and it cannot be *presumed* that a work deliberately undertaken by the city, under the advice of experts in such matters, for the advantage of its own commerce, will be otherwise than advantageous thereto. There has been no legislation by the United States in exercise of any control which that Government may possess over this latter subject, and I apprehend that the chances that it may do so hereafter affords no ground for an interference based upon the anticipation that in such event the dike will be a nuisance.

The injury to the shore of Illinois raises a question that will be decided by the proper tribunals whenever brought before them at the instance of that State, or of such citizens as may be directly interested.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved.

EDWARDS PIERREPONT.

BRANDING CIGAR-BOXES.

The *proviso* in section 31 of the act of June 6, 1872, chap. 315, authorizing the use of wood, metal, paper, &c., separately or in combination, for packing tobacco, snuff, and cigars, under regulations of the Commissioner of Internal Revenue, does not by implication modify or in

Branding Cigar-Boxes.

any way affect the requirement of the act of July 20, 1868, chap. 186, section 89, that certain numbers and names be burned into cigar-boxes with a branding-iron before removing them from the manufactory.

DEPARTMENT OF JUSTICE,

October 11, 1875.

SIR: The case stated by the Commissioner of Internal Revenue to you in his note of the 29th ultimo, which on the 30th ultimo was transmitted by you to this Department, is briefly as follows:

The internal revenue act of 1868, chap. 186, sec. 89, (15 Stat., 160,) required certain numbers and names to be *burned into cigar-boxes with a branding iron*, before such boxes should be removed from the cigar manufactory—nothing being said in that law, or any other law up to that time, as to the material of which such boxes should be made. Afterwards, by the act of 1872, chap. 315, sec. 31, (17 Stat., 252,) it was provided “that wood, metal, paper, or other materials may be used separately or in combination for packing tobacco, snuff, and cigars, under such regulations as the Commissioner of Internal Revenue may establish.”

The question occurs whether this latter provision has *impliedly* effected a modification of the above requirement of a brand, so far as to authorize the Commissioner to dispense with it by “regulations,” substituting (*ex. gr.*) a stencil mark, &c.

If the later authority conferred upon the Commissioner, to allow cigar-boxes to be made of wood, metal, paper, &c., were necessarily inconsistent with the earlier requirement of a brand, there would be a fair ground for conclusion in favor of such modification. But if the material specified in 1872 be not necessarily inconsistent with the branding provision of 1868, there is, as I apprehend, little ground for such conclusion; *i. e.*, if there be paper which will *admit* of branding with a hot iron, and metal that will *display* marks made by such branding, the act of 1872 is to be read as giving permission to use *only* such paper, metal, and other materials as will admit of and display names, numbers, &c., *branded thereinto with a hot iron*.

As there is such paper, metal, &c., I am of opinion that the

Case of Maxwell's Heirs.

requirement of burning with a hot iron, &c., is not to be dispensed with.

The "regulations" intrusted to the Commissioner are obviously incidental to the provision as to "material" and are not intended to confer power irrespective of such change. I therefore cannot attribute to this incident a scope beyond that attributable to its principal.

The result that this attributes no significance in this respect to the provision of 1872 is not important, for it may have significance in some other respect; and, besides, in a statute meant for frequent application in important every-day transactions, by persons having no special skill in construing statutes, the policy of legislators is always to be rather *superfluous* than *obscure*. As cigar-boxes in fact have always, I believe, been made of *wood*, it may have removed a doubt to authorize them expressly to be made of other materials; and, besides, here and there some one may have been found to believe that *burning* meant more than permanent results of heat applied with a hot iron, and was inconsistent with the use of any kind of paper.

Previously to this amendment manufacturers might be the more averse to experimenting upon "materials" other than the one previously in use, because the removal from the factory of cigars "not properly boxed" is, by virtue of the same section which requires "burning," &c., a *felony*. And perhaps this consideration renders me less willing, in a matter of a supposed conflict of provisions, to sanction a construction which, if not concurred in by the courts, will expose citizens to so grave a consequence.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

EDWARDS PIERREPONT. .

CASE OF MAXWELL'S HEIRS.

In November, 1799, a concession of four square leagues of land, in territory now within the State of Missouri, was made by the Spanish

Case of Maxwell's Heirs.

authorities to M., for certain purposes. In February, 1806, the land was surveyed, and the survey certified to by the surveyor-general for Upper Louisiana. In June, 1806, and again in May, 1810, claim for the land under said concession and survey was presented by M. to the board of land commissioners for Louisiana Territory and was rejected. M. died on the 28th of May, 1814. On the 27th of April, 1816, Congress passed an act for the benefit of certain nephews of M., which released to and vested in them all the right, title, and interest of the United States in and to any real estate whereof M. died seized. The land included in said survey having since been surveyed by the United States as public lands, and a large part thereof disposed of, the heirs of the nephews aforesaid have applied for scrip under the act of June 2, 1858, chap. §1, in lieu of the land.

Held (1) that M.'s seizure of the land referred to, at the time of his death, may be proved by traditional or hearsay evidence; (2) that by the presentation of the concession and survey to the board of commissioners, and from the recognition by Congress of possession and claim according thereto as existing in claims of the same class from 1811 to 1829, M. must be regarded to have been seized of the land when he died; (3) that accordingly M. "died seized" of the land within the meaning of the act of 1816; (4) that this act is equivalent to a patent for a specific tract of land, and both located and satisfied the inchoate claim of M.; (5) that the act of 1858, being limited to land claims not located or satisfied, is inapplicable.

DEPARTMENT OF JUSTICE,

November 5, 1875.

SIR: The subject-matter of your communication of 27th of August last is as follows:

On the 3d of November, 1799, whilst the territory now comprised within the State of Missouri belonged to Spain, as part of Louisiana, the Spanish authorities made a concession to *James Marwell, curate of Saint Generiere, and vicar-general of Illinois, of four leagues square of the vacant lands therein situated between the Black River and the Currents, which are branches of the White River, at the distance of from thirty to thirty-five leagues from Saint Generiere, for the colonization thereupon of Irish Catholic emigrants.*

On the 9th of February, 1806, the premises (containing one hundred and twelve thousand eight hundred and ninety-six arpents) were surveyed by the deputy surveyor, and certified to by Soulard, the surveyor-general for Upper Louisiana.

On the 28th of June, 1806, and again on the 29th of May, 1810, a claim for this land under the above concession and

Case of Maxwell's Heirs.

survey was presented by Maxwell to the board of land commissioners appointed by the United States to pass upon land claims in the Louisiana Territory, and upon both occasions it was rejected.

On the 15th of March, 1833, it was again presented to that board by the Catholic bishop of Missouri, claiming as successor to James Maxwell, vicar-general, &c., as aforesaid; and on the 20th of August, 1835, it was again rejected.

There is no evidence by witnesses having personal knowledge thereof that James Maxwell ever took actual possession of the above premises. The only evidence of such possession is by witnesses who at an early day, going back to 1820, were acquainted with persons that had known Maxwell, and told the witnesses that he had been in possession of said premises—making a clearing and improvement and building several houses thereupon, among others a stone house, in which a store was kept. Maxwell died on the 28th day of May, 1814. Upon the 27th of April, 1816, Congress passed an act (6 Stat., 168) for the benefit of John P. and Hugh H. Maxwell, nephews of the said James Maxwell, which *released to them all the right, title, and interest of the United States in and to any real estate whereof a certain James Maxwell died seized on the 28th of May, 1814, and vested the same in them as fully as if they had been citizens of the United States on the said 14th (1 28th) of May, 1814.*

James Maxwell had owned and died seized of some small tracts besides the large one now in controversy.

The tract included in the above Soulard survey has within a few years past been surveyed by the United States as public lands, and a very large part thereof has subsequently been disposed of.

The heirs of the said John P. and Hugh H. Maxwell have now applied for scrip under the act of June 2, 1858 (11 Stat., 294), in lieu of the said one hundred and twelve thousand eight hundred and ninety-six arpents.

Upon the above statement you ask the following questions:

1. Is the evidence of tradition and reputation hereinbefore referred to competent to prove the fact to which it relates?
2. Do the concession and survey of Soulard aforesaid establish the seizin of the said James Maxwell at the time of his death?

Case of Maxwell's Heirs.

3. Upon the facts aforesaid, was the said James Maxwell seized of the premises in controversy at the time of his death, within the purview of the said act of April 27, 1816?

4. Are the heirs of the said John P. and Hugh H. Maxwell entitled to scrip or certificates of location under the act of June 2, 1858, in lieu of the lands contained in the Soulard survey?

I will now proceed to submit answers to these questions:

1. As regards the first question, the facts are, that the possession to which the evidence relates ended more than sixty years since, on the 28th of May, 1814; that facts denoting a possession by *somebody* (*viz., fields and houses*) were known to the citizens who attended the *hearsay* as to the party connected therewith. Referring more particularly to the testimony of Buford and Huff (see papers transmitted), the evidence is that residents in the vicinity of the land, now dead, told Mr. Huff long ago that the old houses and fields, whose existence is proved by Mr. Buford, were, to their knowledge, once occupied and cultivated by James Maxwell.

It seems to me that this evidence is competent, under a rule extensively adopted in the United States, and thus stated by the learned and able lawyers who in 1838 constituted the supreme court of North Carolina:

"In a country recently, and of course thinly settled, and where the monuments of boundaries were neither so extensively known nor so permanent in their nature as in the country of our ancestors, we have from necessity departed somewhat from the English rule as to traditional evidence. We receive it in regard to *private* boundaries, but we require that it should either have something definite to which it can adhere, or that it should be supported by proof of correspondent enjoyment and acquiescence. A tree, line, water-course may be shown to have been pointed out by persons of a by-gone generation as the true line or water-course called for in an old deed or grant. A field, house, meadow, or wood may be shown to have been reputed the property of a particular man or family, and to have been claimed, enjoyed, and occupied as such." (3 Dev. & Bat., 51.) See *Martin vs. Folgee*, 15 Cal., 275; *Boardman vs. Reed*, 6 Pet., 328.

2. As it appears that both the concession and the survey were presented by James Maxwell to the commissioners, it

Duty of District Attorney.

follows, according to the decisions in *Chouteau vs. Eckert*, 2 How., 344, *Bissell vs. Penrose*, 8 How., 317, and other like cases, that although such survey was merely *private*, yet as possession and claim corresponding thereto was, during the period from 1811 to 1829, recognized by Congress as existing in that class of claims, James Maxwell, in consequence of that circumstance alone, (waiving all hearsay evidence,) must be regarded as having been *seized* of the land in question when he died.

3. I therefore conclude (upon each of the principles just stated, considered separately) that Congress, by the words "died seized," in the act of 1816, intended to describe the relation held by Maxwell at the time of his death to these lands.

In arriving at this *intention*, it must be borne in mind that Maxwell's survey and claim of fee-simple thereunder had, a few years before, according to law, been duly reported to Congress by the Louisiana commissioners.

4. Inasmuch, then, as Maxwell's possession or *seizin* was after 1811 regarded by Congress as coextensive with the Soulard survey, a confirmation of land described by reference to his *seizin* was equivalent to a confirmation thereof according to the boundary set forth in such survey. The act of 1816, therefore, amounted to a patent for a specific tract of land, and both *located* and *satisfied* the inchoate claim of James Maxwell.

It follows that the act of 1858, which affords remedy only where land claims "have *not* been located or satisfied," has no application.

Very respectfully, your obedient servant,
S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved.

EDWARDS PIERREPONT.

DUTY OF DISTRICT ATTORNEY.

Section 15 of the act of June 22, 1874, chap. 391, modifies section 838 Rev. Stat., in so far as to require the district attorney to commence proceed-

Duty of District Attorney.

ings in all cases covered by the latter section, excepting *only* where the case cannot, in his judgment, be "sustained."

It is the duty of the district attorney, however, to report the facts to the Secretary of the Treasury in every case, (as well where proceedings are instituted by him as where they are not,) to the end that the Secretary may determine what "the ends of public justice require" in relation thereto.

DEPARTMENT OF JUSTICE,

November 11, 1875.

SIR: I submit for your consideration the following opinion in reply to yours of the 5th instant, addressed to the Attorney-General, asking "whether section 15 of the 'act to amend the customs-revenue laws and to repeal moieties,' approved June 22, 1874, is to be construed as repealing so much of section 838 Revised Statutes as makes it incumbent upon every district attorney in cases of violation of the customs-revenue laws to report to the Secretary of the Treasury for his direction, where the attorney decides that proceedings cannot probably be sustained or that the ends of public justice do not require proceedings to be instituted."

Since the passage of the above act of 1874, the district attorney must "initiate" proceedings irrespective of his own judgment as to the "ends of public justice" in that connection. But his official duty will still require that he shall *at once*, pending such *initiation*, report the fact to the Secretary and take his direction in regard to the further prosecution of the same. Practically, with due diligence by the United States attorney, the ends of economy alluded to in the letter inclosed by you may be almost as well served in this way as heretofore, and at the same time effect may be given to the obvious desire expressed in the act of 1874 to reduce to a minimum the number of public officials who in such matters are competent to "compromise" or "relieve," or (which might under a loose construction be the same thing) enter in that connection into a consideration of the broad "ends of public justice."

My view of the effect of the act of 1874 upon section 838 is that the United States attorney may wholly abstain from proceeding only where he thinks that the case cannot be "sustained"; that in other cases he must *bona fide* initiate proceedings; that in both cases he should still report the

Forfeiture of Contract.

facts to the Secretary and receive "directions" still; the only change being that these directions, if coinciding with the views of the report, will, in cases other than such as cannot be sustained, be directions forbidding a further prosecution, instead of acquiescing in such a course *already taken* below; whilst as regards cases reported *not sustainable*, such directions will still be mere acquiescence. This constitutes the Secretary the only judge of what the *ends of public justice* require, whilst it leaves the attorney to pass upon such professional matters as are involved in the question whether a case can be sustained.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

EDWARDS PIERREPONT.

FORFEITURE OF CONTRACT.

Where a person contracted with the United States to remove certain rock from the harbor of San Francisco, and whilst engaged in the work was enjoined by a court of the State from receiving an installment of pay due thereupon, whereby he was hindered from going on with the contract: *Held* that process issued under the authority of a State cannot legally obstruct, directly or indirectly, the operations of the United States Government; yet *advised*, under the circumstances here presented, that the contract be declared forfeited.

DEPARTMENT OF JUSTICE,

January 3, 18.6.

SIR: I have considered yours of the 17th ultimo and its inclosures, addressed to the Attorney-General. From this it appears that the person who contracted with the United States to remove Rincon Rock, in the harbor of San Francisco, whilst actively engaged in such work, has been enjoined by a court of the State of California from receiving an installment of pay due him thereupon, and thereby has been hindered from proceeding under his contract. It also appears that this delay upon his part has been prolonged so far as to render him liable to have his contract declared *forfeited*, with

Forfeiture of Contract.

a consequential liability upon the part of his sureties to complete the same; and that such a declaration of forfeiture, &c., would probably result in a satisfactory completion of the work. This state of things seems to be very plain.

It is clear that no process issued under the authority of a State government can obstruct, directly or indirectly, the operations of the Government of the United States. Therefore a contractor cannot, *dum ferret opus*, be hindered from receiving and applying to the prosecution of his *current* work the *current* payments by which the United States supply him with ability to serve them.

The principles which govern this state of things seem to be very plain. It might be well to have a case involving them presented to the Supreme Court of the United States, so that the annoyance and hinderance often arising in this connection might be put an end to by an authoritative declaration.

In the present state of authority it would be offensive to advise a contractor in the case supposed to disregard the injunction; and such disregard would involve him, temporarily at least, in grave personal complications.

The only other general relief is to have the case speeded by writs of error to the highest court of the State, and finally to the Supreme Court of the United States.

Inasmuch as in the present case a declaration that the contract has been forfeited, &c., promises effectual relief, as appears by the case presented to you, I recommend that course to be taken.

No other occurs to me as equally advisable, taking into consideration at once the urgent requirements of the public service and the maintenance of a proper deference for the orders of the tribunal which has interfered—a deference which in the absence of recent adverse decisions by our highest court, *covering the very point here at issue*, seems indispensable.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved.

EDWARDS PIERREPONT.

Obstruction to Navigation.

OBSTRUCTION TO NAVIGATION.

Where a dike was being constructed by an iron company in the Ohio River, leading from the shore to deep water, which it was apprehended by persons engaged in navigating that river would obstruct its navigation, and application was made by the latter to the engineer officers of the United States to interfere: Held that in the absence of Congressional legislation the public authorities of the United States have no power to deal with such a matter.

DEPARTMENT OF JUSTICE,
January 12, 1876.

SIR: I have considered the case stated in yours of the 17th ultimo, addressed to the Attorney-General, which is substantially as follows:

An iron company at Steubenville, Ohio, is constructing a *cinder dike* upon its *riparian* property on the Ohio River to *deep water* opposite, so as to enable it the better to ship its products. In the opinion of an expert grave cause exists to apprehend that this dike will obstruct the navigability of the river at that point, and persons whose business calls them to navigate the river have applied to engineer officers of the United States at Cincinnati for protection against this threatened injury.

Whether the dike is or threatens to be a nuisance to navigation upon the Ohio is a question of fact, which, like all other such questions, when involving rights of property, must be tried by the ordinary civil tribunals of the country. In the absence of Congressional legislation the public authorities of the United States, as I suppose, have no power to deal with such a question upon their own motion. If private citizens who have an interest in the matter choose to refer such question to the courts of Ohio or (the rules of jurisdiction over persons being observed) to those of the United States, no doubt a proper relief will be administered. (*State of Pennsylvania vs. Wheeling Bridge*, 13 Peters, at p. 567, &c.) In theory the remedies now enjoyed by private citizens in respect to nuisances are perfect; and these apply to nuisances upon rivers as completely as to those existing elsewhere. It remains with Congress alone to authorize the sort of interference suggested by the parties referred to above, and that

Advertisement of Mail-Routes.

body has not chosen so to do. I concur upon this point in the views of the Chief of Engineers, expressed in a communication which I find amongst the inclosures transmitted with your letter.

Very respectfully, your obedient servant,
S. F. PHILLIPS,
Solicitor-General.

Hon. W. W. BELKNAP,
Secretary of War.

Approved.

EDWARDS PIERREPONT.

ADVERTISEMENT OF MAIL-ROUTES.

In October, 1875, the Postmaster-General requested the publisher of a newspaper in Alabama to insert therein an advertisement of proposals for carrying the mail in that State, provided he would do it for a sum not exceeding \$688.12. The advertisement was duly inserted, and the publisher claims therefor \$1,992, the latter amount being agreeably to the rate fixed by the Clerk of the House of Representatives under section 3823 Rev. Stat.: *Held that section 3941 Rev. Stat., and not section 3823 Rev. Stat., furnishes the law applicable to this case; that under the former of these sections the Postmaster-General had power to select the medium of advertising the proposals and to limit by agreement the compensation therefor, and that the publisher is bound the same as he would be in an ordinary case of compliance with a request conditioned like the above.*

DEPARTMENT OF JUSTICE,
January 13, 1876.

SIR: I have considered the case stated in yours of the 6th instant, addressed to the Attorney-General, which is substantially as follows:

On the 30th October, 1875, the Postmaster-General transmitted a note to the publisher of the National Republican at Selma, Ala., requesting him to insert for a certain period an advertisement inviting proposals for carrying the mails in the State of Alabama, provided *it could be inserted* "for a sum not exceeding \$688.12." Thereupon such advertisement was duly inserted. The publisher, however, now claims therefor the sum of \$1,992, upon the ground that the Republican was selected by the Clerk of the House of Representatives (under

Advertisement of Mail-Routes.

the authority of Rev. Stat., sec. 3823) as one of the papers in which *all advertisements by any executive officer of the United States shall be published*, and that such Clerk (under the same section) *fixed the compensation* for such work, and that by such ascertainment it amounted to the sum above charged.

The question to which my attention is specially invited is whether section 3823 (above cited) so controls the dealings between the Postmaster-General and the Republican as to prevent all operation of the ordinary rules by which parties acting upon letters like that of the Postmaster-General above cited are usually bound. In other words, cannot a person who otherwise would be entitled by law to receive a certain sum for his services agree to receive a less sum; and, if so, does not the above statement witness an agreement to that effect? Is it, on the face of the above section, so much *public policy* that a publisher shall receive a certain sum that his agreement to receive a less sum is a nullity?

I need not discuss this question, and waive it the more readily, because a decision in favor of the Government would leave unanswered questions upon cases in which the publisher may have taken or shall take the advertisement with a *protest* in behalf of his legal rights—a circumstance which, under the very rigid provisions of the section before me, might be embarrassing.

There is another question which I pass, viz., as to the present competency of section 3823 considered as giving the Clerk of the House of Representatives power to make contracts on behalf of Executive Departments. I very seriously doubt whether so much of the act of 1867 as makes this provision was "permanent in its nature" within the meaning of section 5595 of the revision. It bears upon its face marks of the very extraordinary circumstances which called it into existence. Those circumstances, by the judgment of Congress, have passed away, and a consideration of the question whether the act does not confer upon an officer of one House of Congress functions as to the particular matter before me which are anomalous may well be had when a case calling for it has arisen.

I entirely waive it now, for I am of opinion that the act of 1872 (Rev. Stat., sec. 3941) gives the law for the case pre-

Advertisement of Mail-Routes.

sented. That act makes provision for the specific case of advertising for contracts for carrying the mail and for other advertisements of the Post-Office Department. After enacting that the Postmaster-General shall give public notice in newspapers, it proceeds thus: "and the Postmaster-General shall direct, by special order in each case, the newspapers in which mail-letting or other proposals relative to the business of his Department shall be advertised, and no publisher shall be paid for such advertisement without having been requested by the Postmaster-General to publish the same."

This language cannot be reconciled with that of section 3827 by a suggestion that the newspapers in which the Postmaster-General is to direct such notices to be given must be the newspapers selected by the Clerk of the House of Representatives. It is plain that *the direction of the Postmaster-General, by special order in each case*, required (above) in order to justify payment to a publisher, is a provision differing entirely from one by which a law deprives that officer of all discretion in giving directions as to the newspapers in which the advertisements are to be made. Again, the act of 1872 is a specific act, applying to the Post-Office Department, whilst the act of 1867 applies to all executive officers. This, by a well-known rule of construction, gives to the former preference in operation as regards the Post-Office Department. Another matter is that in 1872 the causes for which Congress made the distinction observed in the law of 1867 between the States there mentioned ("the ten *rebellious* States") had, in the opinion of the national legislature, ceased to exist. It is in accordance with the judgment of Congress as to the general condition of things that the act of 1872, which was a re-enactment and consolidation of all the post-office laws, put an end to such distinction made by the act of 1867.

I need hardly add that the *enumeration*, at the close of the act of 1872, of certain statutes as repealed by it, does not prevent the operation of the rule by which that act does also modify any other statute that may be substantially inconsistent therewith.

It remains to observe that the Revised Statutes were intended (section 5595) to be a recognition of the statutory law of the United States, "permanent in its nature," *as it existed*

Advertisement of Mail-Routes.

on the first day of December, 1873, and were not intended to change such law. Therefore, the mere bringing forward of the act of 1867 into that revision alongside, as it were, of the act of 1872, did not, without more said, alter the relative effect of those acts. Although it may be admitted that the Revised Statutes have altered the law in some instances, where, for instance, their express language prevents any other conclusion, yet the *presumption* as to all such enactments is otherwise, and this is not rebutted by the facts above mentioned.

I may add that the circumstance (orally suggested to me) that since 1872 the Postmaster-General has conformed his *direction* in such cases to the *selection* made under the act of 1867 by the Clerk of the House of Representatives, does not embarrass the present question, inasmuch as there is nothing in the existence of a power in the Postmaster-General to give directions like those to the Republican, which conflicts with a power in him to direct such advertisements to be made in the way just suggested. In his discretion and upon his own responsibility he may under that power designate the same newspapers that have been already designated for like purposes by the Clerk of the House of Representatives, and that without troubling himself about the *right* of such latter appointment, or anything else except the *fact* that it had been made. What is asserted here is, *not* that he cannot make such designation in this latter way, *but* that he need not.

I am therefore of opinion that the publishers of the Republican are bound by the conclusions drawn in ordinary cases from a compliance with a request conditioned as is that of the Postmaster-General above, and therefore are entitled to no more than \$688.12,

I am, very respectfully, your obedient servant,
S. F. PHILLIPS,
Solicitor-General.

The POSTMASTER-GENERAL.

Approved.

EDWARDS PIERREPONT

Contracts with John M. Mueller.

CONTRACTS WITH JOHN M. MUELLER.

In July, 1872, M. contracted to furnish all the dimension stone required for the custom-house building at Chicago, Ill., to be delivered at its site, and to be "of uniform color, free from flaws, stains, or discoloring matter." By a subsequent contract he agreed to cut such stone in such manner and at such place as might be required by the agent of the United States: *Held* (1) that the two contracts are not merged into one by the fact that M. is contractor in each: (2) that his obligations under the first contract are not affected by his engagement under the second, nor are his rights under the latter affected by the fact that he had furnished the stone upon which the work was to be done.

The undertaking of M. in the first contract that the stone should be free from discoloring matter, stains, &c., (it being understood that such stone needed to be cut before being used,) was in effect an undertaking that *when cut* the stone should be free from discoloring matter, stains, &c.

Under the second contract he fulfills his obligation if he skillfully cuts the stone furnished by the United States, though it has only been provisionally accepted by the latter, and is not responsible for the stock.

DEPARTMENT OF JUSTICE,
January 17, 1876.

SIR: Yours of the 11th ultimo, in reference to the two contracts with John M. Mueller for dimension stone, &c., for the custom-house building at Chicago, has been duly considered.

The former of these contracts, made July 23, 1872, binds Mueller, amongst other things, to furnish from a certain quarry in Adams County, Ohio, all the dimension stone that may be required for such building, the same to be delivered at its site, and to be "of uniform color, free from flaws, stains, or discoloring matter." The stone was to be paid for at the time of its delivery—10 per cent. thereof as usual being retained as a guaranty of the fulfillment of the contract.

By a subsequent contract, dated February 18, 1873, Mueller, who is described therein as the person who had made the contract above, agreed to furnish the proper means for cutting, and to cut each stone in such manner and at such place as *might be required by the agent of the United States*.

It is stated that, in accordance with the right reserved to them to select the place at which the stone should be cut, the United States, through their agent, have selected the city of

Contracts with John M. Mueller.

Chicago, leaving the precise locality to the convenience of the contractor, and that thereupon the latter has chosen a spot about two miles distant from the site of the proposed building, at which point all the rough stone has been unloaded from cars, and whence, after cutting, it has been transported to the building.

I am of opinion that the above two contracts are not merged into one by the fact that Mueller is contractor for both; also, that his obligations under the former contract are not affected by his engagement under the latter; and, conversely, that his rights under the latter contract are not affected by the fact that he had furnished the stone upon which the work is to be done.

Under the first contract Mueller is to furnish stone for a particular purpose, which purpose he knew required it to be cut; and so, in effect, he has agreed that *when cut* it shall be of *uniform color, free from flaws, stains, or discoloring matter*. This is no more than to apply the common principle that where one furnishes material *for a particular purpose*, his special words of warranty are in effect to be attached to the article as applied to such purpose. A warranty that certain stone shall be free from discoloring matter—it being understood that such stone will need to be cut before being used by the vendee—is a warranty that it shall possess that quality *after being cut*. Therefore, when the stone is delivered *in the rough*, it is accepted subject to the condition that on being cut it shall still answer the warranty.

By the second contract Mueller is to cut the stone which the United States may supply to him for that purpose, out of that which under the first contract he has delivered and they have received, subject to the results of cutting. He cannot cut whatever stone he may choose to cut of the lots quarried by him and brought to Chicago. The agents of the United States have a right, even whilst the stone is in the rough, to decide whether any part of it fails to answer the above description, and none of that not accepted by them provisionally is to be manufactured. I say accepted by them *provisionally*, for after the stone has been cut it is again to be inspected, and may be returned to Mueller under his first contract, if it then fails to answer the description above

Court of Alabama Claims—Marshal's Fees.

quoted. But if it be returned after such inspection for faults in the material, Mueller does not lose the price agreed to be paid *for cutting*. As cutter he fulfills his duty by skillfully cutting the stone furnished by the United States, and is not responsible for the stock. Such return involves only a loss of the price of the stock. I of course do not here speak of rejections occasioned by faults in cutting.

Such seem to me to be the results to the United States of having in this case divided between *two* contracts and virtually two persons the obligations generally created by *one* contract and devolved, *in solido*, upon *one* person.

On perusal of the first contract, I was inclined to think (from the use of the word "boxing" in that part which specifies what items the United States may deduct from the price to be paid to Mr. Mueller in case they be compelled to undertake the work themselves) that it was understood between the parties to the first contract that Mr. Mueller was to deliver the stone cut (*he, however, having then no duty in connection with such cutting*) or uncut, as the United States might determine, but after two free conversations thereupon with the Supervising Architect, I have concluded to leave the matter for further consideration, as it is probable that the present opinion will settle all practical questions between Mr. Mueller and the United States.

I am, with great respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

EDWARDS PIERREPONT.

COURT OF ALABAMA CLAIMS—MARSHAL'S FEES.

The Court of Commissioners of Alabama Claims has no authority to *allow* compensation to the marshal of the District of Columbia for his services in connection with that court.

For any service of process under the act constituting said court, which comes within the description of any of the acts for which by section 829 Rev. Stat. marshals are allowed fees, (*e. g.*, service of a warrant, or sum

Court of Alabama Claims—Marshal's Fees.

mons, or subpoena, under order of the court,) the marshal is entitled to the fee in such section given.

Fees thus earned and received by the marshal form a part of the emoluments of his office, and should be included in his emolument return.

DEPARTMENT OF JUSTICE,

February 1, 1876.

SIR: Yours of the 29th of December last, addressed to the Attorney-General, submits for his consideration the following case and questions:

"The marshal of the United States for the District of Columbia claims compensation for services in the 'Court of Commissioners of Alabama Claims' at the rate of \$3,200 per annum, commencing July 1, 1875, the legality of which claim is doubted. I have, therefore, to request your advice and opinion:

"First. Whether the marshal shall receive such fees as are allowed by law for similar services performed by him in the United States courts of the District of Columbia, or such compensation as shall be allowed by the Court of Commissioners of Alabama Claims. .

"Second. Does the compensation paid to the marshal, whether as fees allowed by law or as salary allowed by the court, constitute a part of the emoluments of his office, to be reported to the Attorney-General and limited to a fixed sum?"

The officers of the court mentioned above are designated in schedules 4, 5, and 6 of the act which constituted it. (18 Stat., 246.) In these sections express provision is made for compensation to the judges, clerk, and attorney. As to the marshal, section 6 provides "that the marshal of the United States for the District of Columbia or his deputies shall serve all process issued by said court, preserve order in the place of sitting, and execute the orders of the said court;" by section 4 the court is to be "allowed the necessary actual expenses of office rent, furniture, fuel, stationery, and printing, and other incidental expenses * * *, to be audited and paid under the direction of the Secretary of State;" and by section 15 "the moneys necessary for the payment of the salaries of the judges and other officers authorized by this act and of the expenses of the said court as hereinbefore mentioned are

Court of Alabama Claims—Marshal's Fees.

hereby appropriated out of any moneys in the Treasury not otherwise appropriated."

There is therefore a marked distinction between the judges, clerk, and attorney upon one side, and the marshal upon the other. The three former officers were created for the occasion, whilst the latter is an old office, whose duies are, as it were, expanded to meet the same occasion. As regards compensation, express provision is made for the *new* offices, whilst none is made expressly for the *old*.

However, the court is invested with the control of a fund for the payment of its "necessary actual expenses," and in this connection it is suggested that compensation to its marshal is one necessary expense.

It may be assumed that the services of a marshal are necessary services for such a tribunal. The question is, whether compensation for those services, under the circumstances here stated, is also necessary.

Ordinarily *extra services* are connected with a presumption of *extra pay* as incident thereto. Here it is said that the marshal of the District receives by law certain compensation for the *ordinary* duties of his office, but as the duties in question are *extraordinary*, they deserve *extraordinary* compensation; and that such conclusion is so certain as to render it presumable that Congress, although silent as to a specific compensation for this officer whilst providing specific compensation for all the other officers of this court, intended to leave the question of such compensation and its measure to be decided by the court, under an *et cetera* provision for "incidental expenses" usual in such cases.

We are to ask, therefore, whether the addition of new duties to an existing office warrants the raising of an *implied assumpsit* (as it were) against the United States to pay additional compensation to the incumbent.

It will not be questioned that Congress has the power to add such duties, and that whether these warrant additional pay is entirely a matter of legislative discretion.

If in any case Congress has said that they do *not* warrant such pay, there can be no room for doubt.

I think that there could be no more room for doubt if the case were that Congress has made general provision for such

Court of Alabama Claims—Marshal's Fees.

matters, reserving to itself thereby the exclusive discretion of passing upon questions of *additional compensation*, and prohibiting its payment unless there be both an *express legislative allowance* and an *explicit legislative appropriation* therefor.

The principle seems to be that all other departments except the legislative are to presume that the ordinary compensation of an officer is *a full consideration for the whole of his time*, and therefore that such time, if not now fully employed, may be appropriated entirely whenever Congress may choose. In technical language, such additional appropriation of his time and faculties constitutes no *consideration* upon which to base the supposition of an implied promise, or even an equity for compensation, unless in an appeal to Congress.

Section 1764 of the Revised Statutes provides that *no compensation* shall be made for any extra services whatever which any officer may be required to perform *unless expressly authorized* by law; and section 1765 adds that no officer in any branch of the public service, whose salary, pay, or emoluments are fixed by law, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for any other service or duty whatever, unless the same is *authorized by law, and the appropriation therefor explicitly states* that it is for such additional pay, extra allowance, or compensation.

By the former of the sections just quoted compensation for "extra service" must be *expressly authorized* by law; by the second, any appropriation for "other service or duty" must "explicitly state that it is for such additional pay," &c.

It will be seen by referring to its history that the above result has been attained only after repeated legislative efforts to make an end of *extra pay*, and as a means thereto to deprive officers of the United States, whose tempers towards the question are naturally affected by agreeable and long-continued association with the claimant, of any jurisdiction over it.

Whatever may be said as to the strength of the implication conveyed by the Alabama claims act to the effect that Congress *intended* that the marshal should be paid and that the court should both ascertain the measure of his compensation and give a warrant for it, it is enough to say that Congress

Court of Alabama Claims—Marshal's Fees.

has forbidden the employment of *implications* and *presumptions* in such cases, and has made its own *express assent*, given twice over—*ex. gr.*, for *allowance* and for *appropriation*—a necessary prerequisite to the passing of such a claim; or, to come down to the very case here presented, the circumstance that an *express* provision and *explicit* appropriation is made for the judges, clerk, and attorney in the act of 1874, whilst none is made for the marshal, *necessarily* determines in the negative the claims set up by the latter.

The question whether additional pay to a public officer *is necessary* is, under our system, purely legislative in character. Congress therefore by general expressions, which leave to the Court of Alabama Claims a competency to pass upon the necessity of certain contingent expenses, has not committed to that court the power of raising and of deciding upon a question of additional pay. Such a power in persons bearing their relation to the officer here interested is (I say it with perfect respect) the very “mischief” which the above legislation was intended to “remedy.”

I add that I think it plain that, for any service of process under the act constituting the Court of Alabama Claims which comes within the description of any of the acts for which by section 829 of the Revised Statutes marshals are allowed fees, the marshal here is entitled to the fee in such section given; *ex. gr.*, service of a warrant, or summons, or subpoena under order of the Court of Alabama Claims comes *in terms* within the operation of section 829.

Upon the whole, I hope to be understood as answering your questions as follows:

I. For services to the Court of Commissioners of Alabama Claims the marshal is to be allowed fees wherever in terms such services have fees attached thereto by other statutes. *This* is not for *similar services*, but for the *same services* mentioned in the statutes giving fees. Section 829 does not annex its fees to writs, &c., *issuing out of a circuit court*, or *a district court*, but to any *writs* lawfully coming to his hands from any authority. I am also of opinion that the Court of Alabama Claims has no power to *allow* compensation to the marshal.

II. Whatever compensation comes to the marshal because

Letting Contracts—Advertisement.

of the act constituting the Court of Alabama Claims makes a part of the emoluments of his office, to be reported to the Attorney-General, and limited to a fixed sum.

I need not compare this case with that in the 10th volume of the Opinions of the Attorneys-General, p. 458, further than to say that there the act *expressly provided* fees for all "similar services," &c., (*nullum simile est idem,*) and as *explicitly* made an appropriation for their payment. Here the appropriation is not explicit, because the act of itself allows no compensation, but merely adds to a class of duties which are compensated by other statutes.

I am, with great respect, your obedient servant,
S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

EDWARDS PIERREPONT.

LETTING CONTRACTS—ADVERTISEMENT.

In July, 1872, the Commissioner of Patents, without previous advertisement, contracted with P. to furnish certain photolithographic copies of patent drawings of date anterior to July 1, 1870, and of such other dates as the Commissioner might designate, the contract (which was subsequently modified) to run until July 1, 1875. Appropriations were made for continuing the work in 1873, 1874, and 1875. On the 27th of March, 1875, the Commissioner (without advertising) and P. extended the contract so as to cover so much of the appropriation of \$100,000 made by the act of March 3, 1875, chap. 129, for producing copies of drawings of current and back issues, as should be used for producing such copies by photolithographing. P. thereupon made, in good faith, large expenditures to enable him to execute the contract thus extended. The Joint Congressional Committee on Printing were consulted with reference to the original contract and also the extension, and approved both: *Held* that the contract of March 27, 1875, (extension of original contract,) having been made without due advertisement, is not valid and binding upon the Government; and that the fact that the contractor made, in good faith, expenditures to enable him to perform the same does not give it validity.

An officer who, in giving out a contract, has failed to comply with the statutory provision requiring advertisement previous to letting the

Letting Contracts—Advertisement.

contract, cannot, by permitting performance thereunder to proceed to any extent, make such contract obligatory upon the Government.

Opinion of Attorney-General Bates (10 Opin., 416) that, although a statute containing that requirement has been disregarded, yet if the contract has been partially performed it cannot be deemed void, but must be executed according to its terms, disapproved. The present case, however, distinguished from the one there considered.

Sections 490, 491, and 492 Rev. Stat. do not apply to and regulate the production of back issues described in the contract of July, 1872, as of date anterior to July 1, 1870.

The authority to make contracts for the work provided for by the appropriation of March 3, 1875, is vested in the Commissioner of Patents.

The Committee on Printing have, by section 492 Rev. Stat., no power to waive an advertisement except in case of an exigency of the public service. Such power is not implied in their power to prescribe rules for the action of the Commissioner of Patents.

DEPARTMENT OF JUSTICE,

March 20, 1876.

SIR: Yours of the 23d ultimo, addressed to the Attorney-General, in reference to the contract with Norris Peters, is as follows:

“On the 1st day of July, 1872, without any advertisement for bidders, a contract was entered into between the Commissioner of Patents and Norris Peters, which was subsequently modified. The original contract and its modifications are herewith transmitted, marked A.

“At the date of making this contract the Commissioner had received whatever permission could be lawfully given him by the action of the Joint Committee on Printing of the two Houses of Congress, as set forth in the resolution, a copy of which is herewith transmitted, marked B.

“Appropriations were made for continuing the work in 1873 (17 Stat., p. 405), in 1874, (*ibid.*, 504), and in 1875 (18 Stat., p. 105), and the work was so continued for the three years named in the contract. Prior to the expiration of the three years the Commissioner of Patents sent to the joint committee a letter, a copy of the pertinent part of which is herewith transmitted, marked C.

“Upon this communication the joint committee took action, the result of which appears in their official letter to the Commissioner, a copy of which is herewith transmitted, marked D.

“Congress made the appropriation of \$100,000, referred to

Letting Contracts—Advertisement.

in the Commissioner's letter (18 Stat., p. 365), and he afterwards, on the 27th of March, 1875, without advertising for bids, made the contract, the validity of which is now under consideration by me, the original of which is annexed to, and forms a part of, exhibit A, transmitted herewith.

"Mr. Peters, after said contract was made, claims to have expended five or six thousand dollars in the purchase of material and instruments for its due execution before the validity thereof was called in question.

"A protest was entered by the Graphic Company of New York against the carrying out of this contract. A copy of said protest, and an argument of said company in support thereof, is herewith transmitted, marked E.

"The protest was referred to the Commissioner of Patents, who reported thereon, and a copy of his report is herewith transmitted, marked F.

"Mr. Peters also presented an answer to said protest, and arguments have been filed in behalf of Mr. Peters and of the Graphic Company, which are also transmitted.

"On the 4th of August, 1875, my predecessor submitted for your opinion the question of the validity of this contract, in response to which an opinion, signed by the Solicitor-General, was received by this Department, holding the same to be invalid, and that the Congressional Printer should make such contract as might be found necessary. I am not informed that you adopt such opinion as your own, and I therefore submit upon the foregoing statement of facts the following questions, upon which I ask your opinion:

"1st. Do the provisions of sections 490, 491, and 492 of the Revised Statutes, or of the acts of which these sections are a revision, apply to and regulate the production of the 'back issues' of the Patent Office, so called in the appropriation for their production, and which are described in the contract of July 1, 1872, as of 'date anterior to the first of July, eighteen hundred and seventy'?

"2d. Was the contract between the Commissioner of Patents and Norris Peters, of date 27th of March, 1875, made in accordance with then existing law, and is or is not the same valid and binding?

"3d. If it should be your opinion that the contract is in-

Letting Contracts—Advertisement.

valid, then in what officer or officers, under existing laws, is the authority to make such contract vested?

“4th. Has the Joint Committee on Printing, under section 492 of the Revised Statutes, the power to authorize the work provided for in that section to be contracted for without advertisement for bids, when in their judgment the work can be performed under the direction of the Commissioner of Patents more advantageously than in the manner ‘above prescribed’ in the section; and, if the committee have such power, what officer or officers may make such contract?

“5th. If Mr. Peters, prior to the calling in question of the validity of his contract, made large expenditures necessary to enable him to execute the same, but before he actually entered upon such execution, and such expenditures were made in good faith, under the belief that his contract was valid, would such facts affect the validity of his contract, or his right thereunder, as against the Government?”

I observe that, owing to some accident occurring after they left my office, neither of the two papers heretofore prepared by me upon the above transaction has reached you. At all events, one of them has not reached you in due form, and another, dated November 11, 1875, apparently has not been seen by you at all.

Inasmuch as your communication, above given, adds some circumstances not mentioned in that of Secretary Delano, I have reconsidered the whole subject, and now transmit to you the conclusions to which I have come, retaining in some parts language made use of heretofore:

It is very plain that both the contract of 1872 and its extension of 1875 were actually made under the joint resolution of January 14, 1871, reproduced in sections 490, 491, and 492 of the Revised Statutes. That is, at the time when these contracts were entered into the parties thereto considered that their warrant for so doing was to be found in that resolution or in those sections; for in both cases they resorted to a peculiar machinery which is not warranted by law except for contracts specified in that legislation. *The intervention of a joint committee of Congress to regulate a contract made by an Executive Department about its own business* is peculiar, and derives its warrant from the above-cited legislation alone.

Letting contracts—Advertisement.

By applying for and obtaining that intervention for the contracts of 1872 and 1875, the Commissioners leave no doubt as to their views upon the source of their authority therein.

Now, however, the gentlemen who represent Mr. Peters disclaim such authority, and insist that the joint resolution and substituted sections have no application to the question. Amongst others who insist upon this is the gentleman who as Commissioner of Patents in 1872 entered into the contract the extension of which is now before me.

It is clear that Mr. Peters is not *estopped* to seek for *other* authority for his contract, in case that actually adverted to at the time of its creation prove to be insufficient. The question is not so much what was the statute adverted to by the parties, as what was the statute which really controlled the transaction. If there were in 1872 and 1875 any act of Congress which authorized the contract substantially, it is a matter of little moment whether the parties were conscious of its existence.

Still, the fact that all parties concerned founded their action upon what is now by them conceded to be a mistaken view of the law is not without its bearing upon important parts of this discussion; for it concedes that this *contemporaneous action*, and therefore *contemporaneous* exposition of the law, as it is termed, is entitled to no weight. It may be that learned gentlemen can now find somewhere in the law a basis for the transaction, but *the basis contemporaneously acted upon and vouched* is of course admitted to have no existence. The case must rest upon *the state of the law*, without aid from the circumstance that such and such officers have for so many years regarded the law as being so and so; for they accompanied that action with their reasons for so thinking, which reasons are admitted to be unsound.

I may be allowed here to dismiss the topic of contemporaneous official construction presented in the briefs for Mr. Peters, by adding as an objection entirely independent of the one just stated that the action of the Department has not been frequent enough or sufficiently long continued to create such a construction. It has concerned only one contract, and continued only three years—circumstances which, according to authorities, prevent its rising to the dignity of con-

Letting Contracts—Advertisement.

struction. Moreover, the contract of 1872, with regard to which this very recent and very confined action has been had, is, as will be seen, a very different contract from what is called its *extension* in 1875.

So that, upon the whole, I submit that there is no foundation for the position of Mr. Peters, that the Department of the Interior is now obstructed from deciding according to the law of the case as it originally stood by the previous official *action* herein of the Commissioner of Patents; for that action covers only *one* contract, and that *one differing in terms from the present contract*, and it was action confessedly founded upon a mistaken view of the only statute at the time considered by the parties thereto.

When Mr. Thacher, as Commissioner of Patents, in 1875, asked the consent of the joint committee of Congress to an extension of the contract of 1872, he meant, and they understood him to mean, as appears upon the face of his letter and of the reply thereto by the committee, *an extension of time* and not an enlargement of *subject-matter*. The consent given by the committee was expressly to a "continuance" of the former contract, viz, that of 1872, which concerned only "*such drawings of date anterior to the 1st day of July, 1870, and of such other dates as the Commissioner of Patents may designate,*" whilst that of 1875 included "*drawings of current and back issues.*"

If the assent of the joint committee be necessary to the validity of the contract of 1875, I do not see that it has ever been obtained. As appears above, assent was asked in favor of a future contract, *specifically described*, whilst the contract actually thereafter entered into was of a sort substantially different.

I also observe that the chief reason assigned in the briefs of Mr. Peters for paying a larger price for the work done upon *back issues* than for that upon *current issues* is that the former requires greater labor, yet by the contract of 1875 the same price is allowed for both sorts of work. This exhibits another ground of discrepancy between the *rationale* of the contract and the grounds taken by the counsel who desire to maintain its validity.

Although in discussing this topic it be proper to mention

Letting Contracts—Advertisement.

the points above stated, I do not find my opinion upon them, and will, therefore, proceed to a close consideration of the transaction.

By the act of March 3, 1875, Congress, amongst other things, provided as follows: "For photolithographing, or otherwise producing copies of drawings of current and back issues, for use of office and for sale, including pay of temporary draughtsmen, one hundred thousand dollars."

The photolithographing in question was to be done after the 30th of June, 1875. Assent to a private contract for its execution was applied for by anticipation January 25, 1875, and was obtained on the 5th of February thereafter. The consequent contract with Mr. Peters was entered into upon the 27th of March, 1875.

In May, 1875, a petition was presented to the President protesting against the validity of the contract, and upon the 2d of June, 1875, the late Secretary of the Interior decided that such contract was invalid. Subsequently, however, he reopened the question and referred it to this Department. His former action therein is mentioned here only in order to show that for a month before the time at which the execution of the contract was to begin, Mr. Peters had notice that it might be set aside.

In the first place it may be observed that, as more than *three months* elapsed between the time of making the contract and the time at which its execution was to commence, there can be no ground for asserting that public exigencies required advertisement, &c., to be omitted.

This contract must be admitted to be governed by one of three sections of the Revised Statutes; *i. e.*, by section 492, section 3709, or section 3780. In each of these a want of preliminary *advertisement and award* is excused in case of a *public exigency*. Now, if it be admitted that contracts of the kind before us require *advertisement* in any case, the present must have required it, as it cannot be suggested that the three months which were to elapse before the work could begin were consistent with the existence here of *such an exigency*. It is also to be observed that in January preceding the Commissioner of Patents felt sure enough of the *appropriation* to initiate steps towards a contract. He therefore in effect had more

Letting Contracts—Advertisement.

than five months in which to make advertisement. If this length of time did not admit of allowing to the United States the advantage arising from competition between bidders, it is not easy to see how that advantage is to be had in any case.

But I understand that the chief reliance of Mr. Peters to account for the want of an advertisement is upon the position that the photolithographing required by him is really a *personal service*, within the meaning of section 3709 of the Revised Statutes.

In this connection he insists upon the difference between the work upon *current issues* and that upon *back issues*; the latter falling to his lot and making his contract to differ from that by the parties who have taken work which is *entirely upon current issues*.

In the first place, I repeat that the contract with Mr. Peters includes, upon exactly the same footing, both *current* and *back* work.

Again, the chief difference between *back* and *current* work arises from the circumstances that in past years there was no uniform regulation as to the *size* of the drawings with which applicants for patents were required to accompany their specifications; and, besides, that such drawings, where *in line*, have sometimes faded, and so require to be *retouched* in order to produce a good photolithograph; and, where *in pencil*, require to be entirely retraced into line before being photolithographed.

As I am informed, no additional trouble devolves *by contract* upon Mr. Peters because of any of these peculiarities *except the first*, *i. e.*, want of uniformity in size. The two other matters are provided for in the Patent Office before the drawings are delivered to the contractor; although it is true that in fact the *faded lines* spoken of in the second place are sometimes remedied after they come into the hands of the engraver. The change from *pencil* to *line* is done in the Patent Office.

Considerable pains, however, devolve upon the contractor because of the want of uniformity in the size of most of the back issues. He is required to *reduce* all such to uniformity with current issues.

Mr. Peters claims that this incident makes such a distinction between his work and work *merely current* as to justify

Letting Contracts—Advertisement.

the departure that has been made from the practice by which the latter is let under advertisement and award; *i. e.*, in fact makes that to be a *personal service* which otherwise would not be such.

I cannot think that this extra manipulation makes a distinction in kind between the work which has been submitted thereto and other work which, although requiring much manipulation, is not so submitted.

Notwithstanding what is said with so much emphasis and variety of illustration by the counsel for Mr. Peters, it remains a fact that the methods of photography and photolithography are mainly *mechanical* in their nature, and are characterized as such by *artists*. Manipulation and skill no doubt make much difference between the work of one professor of photography and another, but so they do in case of all mechanics and manufacturers. This matter might be elaborated as regards these latter persons with quite as much effect as has been done by Mr. Peters in regard to his calling. But such comparisons and contracts would not prevent a government officer who has to contract for the building of a house, or of a steam-engine, or for the manufacture of goods from letting out the work *after due advertisement*—trusting to the terms of the contract, *ex. gr.*, to the oversight stipulated for and the right of rejection, &c., for procuring a reasonably good article upon fair terms.

Again, although a contract may require in some of its details personal service, this does not make the whole contract one for *personal service* within the meaning of section 3709, Revised Statutes. For instance, although a contractor for a fine public building may have in various parts of the work to employ persons of rare skill in cutting stone or in painting, this circumstance will not except such contract from the requirement of a previous advertisement.

Moreover, I understand the *personal service* mentioned in that section to be *personal service of the party contracted with*, and not personal service which he shall employ. In the present case, if the personal service spoken of be not personal service by Mr. Peters himself, but service of some one employed by him, there is no reason why the part which he assumes by his contract, *which is really no more than that of*

Letting Contracts—Advertisement.

being in a position to employ others to do the personal service desired, may not be competed for by bidders. If, then, the restoration of faded lines and the reduction of drawings, here spoken of, be in fact executed by employés of Mr. Peters—as to which I am not informed—it seems that there can be no pretense that such incidents modify the necessity for an advertisement.

I will not of course be understood here as admitting that, if such *restoration* and *reduction* were done by Mr. Peters himself, they could constitute the present a case of *personal service*, and for the reasons already stated.

I have above put this case upon the grounds alleged in behalf of Mr. Peters in the arguments upon file, but I will add that even if it be referred to sections 490, 491, and 492 of the revisal, unless in the event of an *exigency*, the supposition of which is excluded by the facts of the case, such contract is no less inadmissible.

The “lithography and engraving” spoken of in these sections, by section 492 is to be let to the lowest bidder by the Congressional Printer, unless the Committee on Printing decide that exigencies of the public service do not justify waiting, in which case an immediate contract for engraving may be made; or if the committee think that the work can be more advantageously performed under the direction of the Commissioner of Patents, it shall be so done, under such limitations and restrictions as the committee may from time to time prescribe.

I do not understand the latter clause (italicised above) to invest the committee with any larger power for waiving advertisement, &c., than had already been conferred upon them. Whatever they may “prescribe” to control the action of the Commissioner of Patents, in case the “direction” be transferred to him, it is not intended that they shall “prescribe” an *immediate contract* except in case of *exigency*. The policy of Congress requiring contracts by the Departments in general to be based upon biddings is too well and universally established, and its fitness in this particular business too plainly recognized in the very section before us, to admit of a suggestion that, besides the ordinary exceptions arising from “*exigency*” expressed in the general provision (section 3709) and repeated here, it was intended by this latter clause

Letting Contracts—Advertisement.

to authorize the committee to place the matter in the hands of the Commissioner of Patents, and at the same time empower him at their will to dispense with an advertisement.

No reason appears why this committee should have only a *limited discretion* for allowing an *immediate contract* so long as the work was to be done through the Congressional Printer, and an *unlimited one* if the same should be done through the Commissioner of Patents. When therefore it appears in terms upon the face of the statute that such discretion is *limited* in the first instance, *general expressions* cannot be called upon to show such a change of policy for the latter case as will render that discretion *unlimited*.

In the same connection, I may be allowed to suggest a doubt whether Congress in any case can be considered, except by the use of the most express language, to have conferred upon one of its committees a discretion *at will* of suspending a law. The argument which I am examining suggests that even if there be no *exigency*, and if the work be not *personal service*, the committee, if they choose, may authorize an immediate contract. I think such a power would so obviously tend to suspicion, if not to abuse, that in the absence of *imperative words* the suggestion is inadmissible. How far imperative words would make it good is a topic which I have not now to examine.

Nor, in view of the position taken by the learned gentlemen who have argued this case for Mr. Peters, am I required to do more than allude (again) to the anomalous feature in section 492, by which a committee of Congress is empowered to lay down rules from time to time for the government of an executive officer in matters concerning his duty. Such a supervision, although quite a matter of course in regard to a *Congressional officer*, ("the Congressional Printer,") changes its character substantially when exercised over an *officer of the executive department of the Government*, ("the Commissioner of Patents.")

As I have no reason for thinking that Congress meant that the exceptional jurisdiction conferred upon the Joint Committee of Printing by section 492 should cover other matters to which it is not expressly extended, I conclude that the appropriation for photolithography, &c., now under consider-

Letting Contracts—Advertisement.

ation, (18 Stat., 365,) is to be referred for execution to the Commissioner of Patents under the general laws governing him in the letting of contracts.

Upon the whole, therefore, I submit for your consideration the following replies to the questions asked above:

1st. Sections 490, 491, and 492 do not apply to and regulate the production of drawings of *back issues* of the Patent Office, as described in your first question.

2d. The contract of March 27, 1875, between the Commissioner of Patents and Norris Peters, was not made in accordance with then existing law, and therefore is not valid and binding.

3d. The authority to make contracts for executing the duty imposed by the appropriations of March 3, 1875, (18 Stat., 365,) is vested in the Commissioner of Patents.

4. The only power to waive an "advertisement and award" conferred upon the Committee of Printing by section 492 is that therein *expressed—in case of an exigency of the public service*. None other is implied in their power to prescribe rules, &c., for the action of the Commissioner of Patents.

5th. The circumstance that Mr. Peters has in good faith made expenditures to enable him to execute the contract does not make it valid.

In ordinary cases, where an agent has made a contract in excess of his powers, no doubt if the principal stand by and see the contractor in good faith incur expense to enable him to perform his engagements, such principal cannot avoid the consequences of his silence by pleading that the agent had no power to make such a contract. In many cases such conduct would amount to a ratification.

But I think it is misconception of this well-known principle to suggest that where, as in the present case, a *public statute* requires officers who make contracts for the Government to do so in a way calculated "to prevent favoritism, and to give to the United States the benefit of competition," (Attorney-General Berrien, 2 Opin., 259,) if such officer fails to adopt such course, he, or some other officer of the United States, (the latter being as much a mere agent of the principal as the former,) by permitting the contractor to make expenditures in the course of his engagements, can render that

Letting Contracts—Advertisement.

contract binding upon the United States which otherwise would not be so. In the present state of the law *all officers* of the Government are equally bound by the provision in question. None of them can waive it. In this instance Congress alone of the departments of the Government represents the principal in the case first above stated. Nor must it be forgotten that in the present case, inasmuch as the restriction is created by a *public statute*, it was as much the duty of the contractor as of the Commissioner of Patents to take notice of and comply with the requirement. It was and is a part of the *law of the land*, binding on everybody—a matter not to be forgotten in considering the position of Mr. Peters, *as matter of law*.

I am unable, therefore, to concur in the principles stated in the opinion of Attorney-General Bates, (10 Opin., 422.) Such cases are always, in contemplation of law, cases where both parties have made a contract in violation of the *public and known* will of an absent principal. Besides, it seems to me that the present case is to be distinguished from that before Mr. Bates, inasmuch as Mr. Peters had fair notice before the time at which his contract was to commence (among other things by the opinion of the late Secretary of the Interior) that it might be set aside. The contract was one merely *in extension* (as is said) of a contract then being executed by Mr. Peters, and the United States are not chargeable with notice that such *extension* would involve a large preliminary expense. So far as they are concerned, at the time when the present questions were raised (May, 1875) Mr. Peters had not been and could not have been required to furnish anything under his contract, and the latter remained "wholly executory" in the substantial sense of that expression as used by Attorney-General Cushing, (6 Opin., 406.)

As for the supposed ratification by Congress, implied in its successive appropriations for photolithographing, in 1872, 1873, and 1874, (17 Stats., 405 and 504, and 18 Stat., 105,) it is plain that neither of these provisions indicate that Congress was informed as to the manner in which the contract of 1872 had been let; and, moreover, as has been repeatedly suggested, the ratification of the contract of 1872 affords little presumption that Congress would ratify the very different

Trustee of Cincinnati Southern Railway.

contract of 1875. It would be to manifest no proper sense of the ability with which Mr. Peters has labored to show the substantial difference between a contract to produce copies of *back* issues and one to produce copies of *current* issues, if it were not conceded that the contract of 1875 diverges much farther from the rule of section 3709 than did the contract of 1872. I see no reason to believe that Congress has sanctioned the former divergence; but if it has, I should await its actual judgment upon the latter before yielding to the supposed precedent created by its action in the above appropriation act.

The importance of the principles involved in your communication, the zeal and elaboration with which the subject has been argued before me, and a wish to notice every material suggestion made on behalf of Mr. Peters, will, I trust, excuse the length of this opinion.

I am, with great respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved.

EDWARDS PIERREPONT.

TRUSTEE OF CINCINNATI SOUTHERN RAILWAY.

The position of trustee of the Cincinnati Southern Railway—the duties which appertain to it being defined by certain acts of the Ohio legislature, and appointments thereto and removals therefrom being made by the judges of the superior court of the city of Cincinnati, by which court the compensation of the trustee is also fixed—is a *civil office* within the meaning of section 1222 Rev. Stat., and, therefore, upon acceptance of an appointment to such trusteeship by an officer of the Army his commission in the Army would become vacated.

DEPARTMENT OF JUSTICE,

March 25, 1876.

SIR: Yours of the 22d instant, relating to General Weitzel, and addressed to the Attorney-General, has been referred to me for consideration. Herewith I submit a reply to the question therein presented.

Trustee of Cincinnati Southern Railway.

That question is whether Brevet Major-General Weitzel, major Corps of Engineers, United States Army, can, without vacating his commission, accept of the position of trustee of the Cincinnati Southern Railway.

The duties of such "trustees and their successors" (in number five) are defined by certain acts of the legislature of Ohio, (May 4, 1869, &c.,) which are applicable to any city of Ohio of over 150,000 inhabitants in respect to any railway which such city may authorize; and they are to borrow, for the purposes of the railway, a sum not to exceed \$10,000,000, and to issue bonds therefor in the name of the city; control and disburse such fund; construct a line of railway and telegraph [in three States;] buy, if necessary, other railways and rights of way; appoint officers and agents, and engage with contractors; give bond for the faithful discharge of their duties; make annual reports to the city council, &c.

Such trustees are appointed by the judges of the superior court of the city of Cincinnati, are compensated by allowances fixed by such court, and may by it be removed. The trusteeship is undefined in point of duration, being limited, I suppose, by the purposes of the trust; and, as appears above, the acts contemplate successors to those at any time holding the place.

The city of Cincinnati wishes to avail itself of the services of General Weitzel in connection with this place, and thereupon he is naturally desirous of knowing how his compliance with such wishes will affect his position in the Army, inasmuch as section 1222 of the revisal enacts that if any officer of the Army on the active list accepts of, &c., any *civil office* his commission shall thereby be *vacated*.

I am of opinion that the place above mentioned is a *civil office* within the meaning of section 1222, and, therefore, that upon acceptance of it General Weitzel will cease to be an officer of the Army. The opinion of Attorney-General Akerman, (13 Opin., 310,) in the case of General Meade and the place of park commissioner of Philadelphia, is in point; and upon whatever is special in the present case I concur entirely with the views expressed by the Judge-Advocate-General in his communication of the 20th instant addressed to yourself.

In addition to what has been said, allow me to cite the fol-

Trustee of Cincinnati Southern Railway.

lowing passage from the opinion of Chief Justice Marshall in the *United States vs. Maurice*, 2 Brock., C. C., 96.

"Is the agent of fortifications an officer of the United States? An officer is defined to be 'a public charge or employment,' and he who performs the duties of the office is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the Government and not by contract, which an individual is appointed by Government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."

The duty in the present case is a *continuing one, is defined by rules prescribed by the Government, and not by contract*. The person to perform them is *appointed by a department of the Government, and the duties of the place continue, though the person be changed*.

There is no occasion here to question the judgment by the supreme courts of Ohio (21 Ohio State, 39) that such trusteeship is *not* an office within certain organic provisions of the constitution of that State. For if the prohibitions of section 1222 are to have any substantial operation, it seems that they will reach, amongst others, cases of public civil employment whose duties are so extensive, engrossing, and responsible as the details above given show that this one may be, without regard to the question whether in other senses and for other purposes, State or national, such public employment be *an office*. I suppose, for instance, that the prohibition applies to membership in a legislature, which, however, is technically no *office*. And admitting that for the above purposes of the constitution of Ohio a *continuing* public place, which is merely *temporary*, (say, for thirty years or so,) is no *office*, yet when the question is whether the circumstance that such place is to continue but for thirty years will, for the purposes of sec-

Construction of Telegraph on Public Domain.

tion 1222, relieve it of the objection that would apply if it were *unlimited* in point of duration, I submit that the answer must clearly be in the negative. *The reason of the thing* in the interpretation of the word *office* in the above United States statute seems to be very different from that which controls its meaning in the constitution of Ohio.

With great respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved.

EDWARDS PIERREPONT.

CONSTRUCTION OF TELEGRAPH ON PUBLIC DOMAIN.

A company chartered by the State of Oregon, subsequently to the act of July 24, 1866, chap. 230, constructed a telegraph line over public domain of the United States within that State, but never filed a "written acceptance," as required by that act, and declines to comply with the provisions of that act as to rates for Government telegrams: *Advised* that the company, in respect of the erection of its telegraph on the public lands, is a trespasser, and that the United States (without special legislation) are entitled to all ordinary remedies for trespass given at law, as well as to all extraordinary remedies given in equity.

DEPARTMENT OF JUSTICE,

March 29, 1876.

SIR: Yours of the 24th instant in relation to the telegraph line of the Oregon Steam Navigation Company, addressed to the Attorney-General, has been referred to me, and I here-with submit for your consideration a reply.

The company above named was chartered by the State of Oregon, and, as I gather, since the passage of the United States act of 1866, chap. 230, has constructed a telegraph line running in part over the public domain of the United States in the State above mentioned. Before the 1st of January, 1876, the company, although it had never filed a "written acceptance" thereof, had in practice complied with the provisions of the above act of 1866 as to the rates for Govern-

Construction of Telegraph on Public Domain.

ment telegrams. Since then it refuses to do so, and has formally notified the Government thereof.

The question is, what remedy has the Government for such refusal?—the case, as must be observed, being one in which the United States has forbidden the construction of such lines over its lands, except upon a condition that in the present instance has not been kept.

It is admitted that in the absence of a "written acceptance" the remedy provided in section 5267 (Revised Statutes) does not apply, and I have not been able to find any other statutory remedy for the case. Still the United States are in the situation of other proprietors, and so, without special legislation, are entitled to all ordinary remedies for trespass at common law, as well as to the extraordinary remedies given in equity. I so understand the principles upon which *Cotton vs. The United States*, (11 How., 607,) was decided; and that case has been recently affirmed in *United States vs. Cook*, (19 Wall., 591.)

I suppose that the construction of the telegraph line was allowed by inadvertence upon the part of the public authorities of the United States in that locality. It seems that they ought to have required a previous "written acceptance" of the terms upon which such erection was authorized. They had no power to acquiesce in such appropriation of the land without such written acceptance. In fact, then, the company has at all times been a trespasser in respect of this *erection*.

The United States may therefore abate it, or, if they prefer, may bring an action for the trespass, or an action to eject the company. Circumstances upon which, from the brief statement before me, I am unable to pass, will determine the judgment of the United States authorities in Oregon in choosing amongst these different remedies.

With great respect, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved.

EDWARDS PIERREPONT.

Ocean Mail Service.

OCEAN MAIL SERVICE.

Where the Postmaster-General was authorized by statute to advertise for proposals to perform certain ocean mail service in steamships of not less than 3,000 tons burden; and, after due advertisement, a steamship company proposed to perform the service at a certain price in steamships of from 3,500 to 4,000 tons burden, which offer was accepted and a contract made accordingly: Held that the Postmaster-General cannot accept and pay, under such contract, for service done in steamships of less burden than that stipulated, although they are over 3,000 tons burden.

DEPARTMENT OF JUSTICE,
April 4, 1876.

SIR: In yours of the 28th ultimo, addressed to the Attorney-General, you state the following case: Congress, by act of February 17, 1865, authorized the then Postmaster-General to advertise for proposals for an ocean mail service with China, to be performed in steamships of *not less than* three thousand tons burden; whereupon, after due advertisement, the Pacific Mail Company *proposed* to carry such mails at a certain price in side-wheel steamships of from thirty-five hundred to four thousand tons burden; and this proposal was accepted, and a contract made accordingly October 16, 1866.

The question arising upon this state of things is whether you can accept and pay for a mail service done in accordance with the above contract in all respects except that the steamships are not of as great burden as stipulated, although they are of a burden of over three thousand tons, as mentioned in the act.

Generally, where a statute commands a public officer to contract for certain work to be done at a price not over a sum therein mentioned, or within a certain time therein fixed, the sum or time so specified are merely directory to the public officer, and intended to impose terms beyond which his discretion as to such price or date cannot go. If, for instance, such time be fixed in the act at six months, that will not hinder the officer from binding the contractor to five months; or, if the limit of price be \$10,000, from tying the contractor to a consideration of \$9,000.

In such case the contractor cannot afterwards insist upon

Ocean Mail Service.

the \$10,000 or the six months, and in the same way the public officer cannot agree to allow either. The latter has *executed his power* by entering into the particular contract, and has no more that he can do.

So in the present case the limit of discretion as to the burden of the steamships imposed by the statute has no effect in enlarging the terms of the contract *actually made*. The instance is not so striking to the imagination as if the case were that the Pacific Mail Company had contracted for a consideration of \$400,000, and now for reasons good in *equity* asked to be paid five hundred thousand because the act provided that the Postmaster-General might have contracted to pay that amount; or if, having contracted to carry such mail for eight years, they asked to have the time enlarged to ten years, because by the act it might have been so specified originally.

In either case, after *the power* is once executed in general accordance with the act, there remains no more, outside of Congress, a discretion for readjustment.

I am therefore constrained to differ with the opinion in this case expressed by the learned Assistant Attorney-General for the Post-Office Department.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The POSTMASTER-GENERAL.

NOTE.—The Attorney-General, having been counsel for the Pacific Mail Steamship Company, declined to take any part in the consideration and decision of the case and question above stated.

Contract for Ocean Mail Service.

CONTRACT FOR OCEAN MAIL SERVICE.

An American steamship company having contracted to transport the United States mail between Shanghai and Yokohama, sublet the contract to a Japanese company, the latter company chartering from the former an American vessel, officered by citizens of the United States, and carrying the United States flag, to perform the service, with an agreement to purchase the vessel at the close of the contract term. Under this arrangement the mail was transported for a quarter: *Held* that payment for this service should be made according to the terms of the original contract.

DEPARTMENT OF JUSTICE,
April 19, 1876.

SIR: Yours of the 11th instant, addressed to the Attorney-General, incloses the contract made by the Pacific Mail Company with the United States upon the 20th day of March, 1867, for carrying the mails between Yokohama and Shanghai, and after calling attention to the subletting of that contract by said company to a Japanese company, (dated October 16, 1875,) and specially to the chartering by the latter from the former of the steamship Nevada for the purpose of carrying such mails for the remainder of the term, viz, fifteen months, with an agreement to purchase the same at the close of such term, puts the question whether a performance of the work by such assignee during the quarter ending April 1, 1876, entitles the contractor to receive the money stipulated to be paid therefor by the United States.

I understand that the only question made by the communication is whether the Nevada, after the above transfer and charter, continues to be an "American vessel," as required by the above contract between the United States and the Pacific Mail Company.

By the note received from you (dated the 15th instant) amendatory of the statement contained in your first communication, I observe that the officers of the Nevada continue to be citizens of the United States. It also appears from the provision in the third item of the contract between the Pacific Mail Company and the Japanese company, anticipating the probable occasion for supplying *a loss* of the Nevada, that both parties intended that the mail should be carried by the latter in "steamships under the United States flag."

Liability for Tax on Distilled Spirits.

I am of the opinion that, in the absence of *mala fides*, a charter of an American ship by foreigners does not affect the national character of such ship, (see 3 Blatch., 71,) and therefore that in the case before me there is no reason why the payment shall not be made according to the terms of the original contract.

With great respect, your obedient servant,
S. F. PHILLIPS,

Solicitor-General.

The POSTMASTER-GENERAL.

NOTE.—The Attorney-General, having been counsel for the Pacific Mail Steamship Company, declined to take any part in the decision of the question stated in the foregoing.

LIABILITY FOR TAX ON DISTILLED SPIRITS.

The terms of section 3251 Rev. Stat., namely, "every person in any manner interested in the use of any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom," include stockholders of private corporations engaged in distilling for gain.

DEPARTMENT OF JUSTICE,

April 23, 1876.

SIR: In a communication of acting Secretary of the Treasury Conant, dated April 11, 1876, and addressed to the Attorney-General, the following question is put:

"Is a stockholder in a distilling corporation, not otherwise liable for the debts of the corporation beyond the amount of his stock therein, made individually liable therefor by the provisions of section 3251 of the Revised Statutes, and can his individual property, in no way connected with the business of such corporation, be seized and distrained for taxes due on spirits produced by it?"

I am of the opinion that the section cited does include stockholders of private corporations engaged in distilling for gain within the expression "every proprietor and possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom." The arguments to the

Dismissal in the Navy.

contrary go to show that stockholders in such case are not *proprietors* or *possessed*, but they do not touch the question of *interest*. This interest was recognized in former times upon the question whether such stockholders were competent witnesses for the corporation when engaged in litigation, and I see no reason why a reference to the class of the *interested* is not sufficient to include them for the purposes of the above section. It seems to me that the suggestions made by Judge Dyer in his opinion inclosed in the papers transmitted by you (see Milwaukee Commercial Times, November 26, 1875) touching the policy and purposes of this provision, which also tend to the conclusion above expressed, are entitled to very great consideration.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

EDWARDS PIERREPONT.

DISMISSAL IN THE NAVY.

In October, 1861, S. was appointed by the Secretary of the Navy "an acting master in the Navy, on temporary service," and was dismissed from the service by the Secretary in March, 1862: *Held* that the dismissal was lawful—that in the absence of legislation the Secretary had power to determine the time at which an appointment expressly temporary should come to an end.

DEPARTMENT OF JUSTICE,
April 25, 1876.

SIR: Yours of the 12th instant, addressed to the Attorney-General, presents the following case and question:

On the 9th of October, 1861, Alexander M. Smith was, by Secretary Welles, "appointed an acting master in the Navy of the United States, on temporary service," and upon the 21st of March, 1862, he was by the same person "dismissed the service," the letter of dismissal reciting that he had been reported for drunkenness, cruelty, and disrespect to (his) superior officers." Thereupon you ask whether such dismissal was authorized by law.

Dismissal in the Navy.

Officers holding temporary appointments in the Navy are not either *commissioned* or *warrant officers*, as is recognized by the act of 1862, chap. 204. (Rev. Stat., sec. 1410.) Legislation, therefore, as to the manner in which such officers are to be cashiered, &c., does not apply to the present case.

I am also of opinion that the act of July, 1861, cited to show that the appointment of Mr. Smith must after that date be considered *as for the term of the voyage or of the war*, and therefore during such term was to be ended only by regular methods applicable ordinarily to naval officers of that grade, does not admit of that interpretation.

I premise that the act of 1861 had the same effect upon future as upon past appointments of the sort mentioned.

Its interpretation as to the matter in hand, in regard to past appointments, seems to be that the officer appointed should not have a term longer than that of the voyage or the war, (whichever should be the longer;) not that he should have a term which (subject to ordinary accidents) should continue during the voyage or the war. Because if, for example, the Secretary had in June, 1861, appointed Mr. Smith acting master, &c., to hold at the discretion of the appointing power, although Congress might have passed an act in the next month substantially ratifying such appointment, it would have had to ratify it *as made*, and could not ratify it *giving an extension of its term*, without trenching upon rights of the Executive Department in matters of appointment; that is, it could not say (anticipating the actual duration of the war) that Alexander M. Smith should hold *for and during a term of four years* the office theretofore conferred *at the discretion of the Secretary*.

As I have said, the statute makes the same provision for *future* as for *past* appointments, and therefore I think that its effect upon an appointment made in October, 1861, was what it would have been for an appointment made in June, 1861. I conclude, therefore, that such act does not bear upon the question now presented, but is to be interpreted as suggested above.

I am of opinion also that, in the absence of legislation, the Secretary had the power of determining the *time* at which an appointment expressly *temporary* should come to an end.

Copies of Papers—Application for.

It seems to be generally admitted in this country that the appointing power has entire control of the tenure of its appointments, except where otherwise provided by law. His assignment of a reason in the letter of dismissal was superfluous, and perhaps might well have been omitted.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE NAVY.

Approved.

EDWARDS PIERREPONT.

COPIES OF PAPERS—APPLICATION FOR.

An application for copies of papers on file in a Department, to be used by the applicant in a suit promoted by him under section 3491 Rev. Stat., stands upon the same footing with a like application by a plaintiff in any other private suit.

DEPARTMENT OF JUSTICE,
May 13, 1876.

SIR: In yours of the 5th instant, addressed to the Attorney-General, it is stated that John L. Pendery, esq., has applied for copies of certain papers on file in your Department to be used by him in prosecuting a suit which he purposed to bring against the Kansas Pacific Railroad Company under section 3491 of the Revised Statutes.

I do not, from your communication, understand it to be your wish that the Attorney-General shall give an opinion whether the section cited above authorizes such suit to be brought under the circumstances referred to by Mr. Pendery, as it seems to be enough for the purposes of his application that he is proceeding *bona fide* in the suit and has probable cause for its promotion. I am not advised by you that the application is one which, for any special reasons not appearing upon the face of the papers and the law, is liable to objection. If Mr. P. can make out a case within the above section, it seems that he has a *right* to bring the action proposed, and that his claim for copies, &c., to be used therein stands upon

Copies of Papers—Application for.

the same footing with a like claim by a plaintiff in any other private suit.

Of his chances for a recovery therein I can form no judgment without information as to the *faith* with which the company has made a distinction in freights between some and others of its private patrons, and also, perhaps, in regard to the *proportion of its private business* done under bills of lading like that inclosed by you. It may be likewise that some difficulty will be made as to the applicability of the section cited to dealings by a corporation. But for the reason mentioned above I waive a consideration of these questions

Assuming that Mr. Pendery is engaged in preparing certain matters preliminary to a suit which (as authorized by an express law) he will bring, in part, for his own advantage, and that in the course of such preparation he has found it necessary to communicate his plans to officers of the Government, it seems that nothing ought to turn upon the fact of such communication, but that he should be permitted to go on, and will be aided just as are other private suitors.

If, upon further investigation into the facts of the above dealing by the company, it shall appear that the provision cited by Mr. Pendery from its charter has been violated, but that, owing to the frame of the section under which Mr. P. proposes to sue, such dealing is not included therein, it would be proper for the United States to bring an ordinary action to recover back the excessive freight so exacted.

If this note be not responsive to the purport of your communication I hope to be informed thereof, and to be more particularly directed to the matter requiring consideration.

Very respectfully, your obedient servant,
S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.
EDWARDS PIERREPONT.

Acting Gunner in the Navy—Dismissal of.

ACTING GUNNER IN THE NAVY—DISMISSAL OF.

In January, 1864, S. was appointed by the Secretary of the Navy "an acting gunner on temporary service" in the Volunteer Navy, and in July, 1865, was dismissed from the service by the Secretary: *Held* that a power to appoint gunners to an undefined extent does not preclude the appointment of acting gunners also; that the power to appoint the latter is implied by section 18, act of July 17, 1862, chap. 204, (Rev. Stat., sec. 1410,;) and that, as an acting gunner, S. was liable to dismissal at the will of the Secretary.

DEPARTMENT OF JUSTICE,
June 10, 1876.

SIR: Yours of the 1st instant, addressed to the Attorney-General, presents for his consideration the case of A. S. Soper, who, in January, 1864, was appointed by the then Secretary of the Navy "an acting gunner on temporary service" in the Volunteer Navy, and in July, 1865, was by the Secretary dismissed from the service.

In 1872, and again in 1874, and now again, for the third time, Soper has petitioned for restoration to his former place in the Navy, having in the meantime asked for a court-martial under section 12 of the act of March 3, 1865. (12 Stats. 487.)

These applications have been refused, but, in connection with the latest of them, you ask advice whether the dismissal in 1865 was legal, and refer to the recent opinion of this Department in the case of Acting Master Smith, on the 25th of April last.

The present case is not within the terms of the act of July 24, 1861, (12 Stat. 272,) considered in the opinion above mentioned.

On behalf of Soper, it is argued that inasmuch as the President has power under the act of 1806 to appoint an *unlimited* number of "gunners" in the Navy, there is no need to appoint *acting gunners*, as there was in the case of *acting masters* under the act of 1842, chap. 121, (5 Stats. 500,;) and therefore that the President had no such power. From that position a conclusion is sought to be drawn, that as Soper could not be appointed an *acting gunner*, he must virtually have been created a *regular gunner*.

Acting Gunner in the Navy—Dismissal of.

I think it plain that this conclusion does not follow. He could not be constituted an officer of a sort other than was intended by the appointing power any more than of a sort beyond the jurisdiction of that power. The President, acting through the Secretary, or the Secretary, did not intend to make him a gunner. This case differs in principle from that where the appointing power intends to appoint to a certain office, but at the same time endeavors to incumber such appointment with illegal qualifications. In such case the qualifications are void. Here, the class of places in the Navy designated by the prefix *acting* is well known, and it was clearly the intention of the Secretary to appoint Soper to a place which he thought belonged to that class.

If the Secretary, and the person applying for, or consenting to, such appointment, were mistaken in point of law, it is very certain that as against the Government of the United States, whose limited agent the Secretary was, the appointee cannot claim another office as to his fitness for which the Secretary has passed no judgment.

But I do not agree that the Secretary was mistaken as to his powers. A right to appoint *gunners* to an undefined extent does not conclude against the power to appoint *acting* gunners also. In presence of an *emergency* demanding an increase of persons to exercise the functions of gunners, the appointing power might well desire to keep such appointees specially under its control, so that with the disappearance of the emergency such appointments should become void, such appointing power in the meantime controlling also the question whether such emergency continues to exist, and in what proportions. The power to make such appointments is strongly implied by the act of 1862, chap. 214. (Rev. Stat. sec. 1410.)

Soper, therefore, was not only not created a gunner by the appointment referred to, but was created an *acting* gunner on temporary service. As such he was liable to be discharged from the service at the will of the person appointing him, and when once out of the service can return to it only in the way that other civilians may.

An *acting gunner* is not, as such, even a *petty officer*. (Act of 1862, chap. 204, above.)

In considering a distinction betwixt a *purser* and an *acting*

Fees of District Attorneys.

purser, Chief Justice Marshall speaks of the former as "an officer" and the latter as "an agent." (Randolph's case, 2 Brock. p. 484.)

The acts of 1865, chap. 79, and 1866, chap. 176, (Rev. Stat. p. 282, acts 36 and 37,) making provision as to dismissals of "officers" from the naval service, therefore do not apply to the case of the applicant.

The Secretary of the Navy had power to terminate his connection with the naval service whenever he chose, and his order to that effect was legal.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE NAVY.

Approved.

ALPHONSO TAFT.

FEES OF DISTRICT ATTORNEYS.

District attorneys are entitled, under section 825 Rev. Stat., to a commission upon the "tax" required to be paid by the purchasers of forfeited property sold in pursuance of section 3334 Rev. Stat.

Such tax, however, is not within sections 828 (clause 17) and 829 (clause 6) of the Revised Statutes, and, therefore, clerks of courts and marshals are not entitled to commissions thereon.

DEPARTMENT OF JUSTICE,
July 1, 1876.

SIR: In the communication of the Acting Secretary of the Treasury, upon the 26th ultimo, addressed to the Attorney-General, a question is asked in connection with a practice existing, as is said, in the eastern district of Missouri, whether, under section 3334 of the Revised Statutes, taken in connection with sections 825, 828, (clause 17,) and 829, (clause 6,) district attorneys, clerks, and marshals are entitled to commissions upon the "tax" required to be paid by the purchasers therein mentioned.

Section 825 gives to district attorneys commissions upon all moneys collected or realized in any suit, &c., conducted by them. The commissions given to clerks and marshals by the

Court of Alabama Claims—Marshal's Pay.

corresponding provisions of sections 828 and 829 are (1) *upon moneys received, kept, and paid out in pursuance of any statute or order of court, and* (2) *upon moneys received and paid over.*

Under this legislation I am of opinion that district attorneys *are* and that clerks and marshals *are not* entitled to the commissions claimed as above. Such tax is *realized* by the suit, but is not *received*, or *kept*, or *paid over* by clerks or marshals, as the law requires it to be received by a *tax-collector*, and *kept* and *paid over* by him. It is, therefore, *within* section 825, and *not within* sections 828 and 829 quoted above.

The distinction between the tax realized under the two first clauses and that realized under the last clause of section 3334, referred to in the communication of the Commissioner of Internal Revenue, transmitted by the Acting Secretary, does not affect the claim to commissions under section 825.

It is true that the former is a tax already due to the United States, whilst the latter is a new tax, growing out of the suit and sale. Nothing, however, material to the claim, under section 825, turns upon this, and the probability is that a much larger part of the commissions earned under that section comes out of moneys *withheld from* the United States by its debtors, and merely reduced into possession by the suit, than out of moneys which are, as it were, *a profit arising out of the proceeding itself.*

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

ALPHONSO TAFT.

COURT OF ALABAMA CLAIMS—MARSHAL'S PAY.

The clerk of the Court of Commissioners of Alabama Claims, in his capacity as disbursing agent, paid to the marshal of the District of Columbia, for his services, a certain amount of money, under an order of that court requiring him to pay to the marshal, monthly, a salary of \$3,200 per annum: *Held* (reaffirming opinion of February 1, 1876) that the order of the court was no warrant for the payment as salary; *held*, further, that it was no warrant for the payment as an amount advanced to the marshal, to be by him accounted for at the Treasury.

Court of Alabama Claims—Marshal's Pay.

DEPARTMENT OF JUSTICE,
July 6, 1876.

SIR: I have read and considered yours of the 16th ultimo, addressed to the Attorney-General, and also the notes of the Secretary of State and of the clerk of the Court of Alabama Claims therein inclosed.

These papers show that Mr. Davis, the clerk above mentioned, is, by appointment of the Secretary of State, a *disbursing agent* to execute the *direction* of the Secretary referred to in the fourth section of the act constituting the court. (18 Stat., 246.) As such, he has from time to time received funds for which he is accountable at the Treasury. In the accounts heretofore submitted by him he claims credit for several items, amounting in all to \$3,105.03, paid by him, under an order by the court, to the marshal of this District who, by the act is its marshal. By that order, which is filed, dated August 20, 1875, Mr. Davis was required to pay to the marshal, monthly, a salary at the rate of \$3,200 per annum. The sum now in question consists of payments so made. It is plain that the order is no warrant to Mr. Davis, except for payments authorized by law.

In an opinion (February 1, 1876) referred to in the papers, this Department has already held that the court had no power to pay a salary or make any special allowance to the marshal for his services in that connection.

Conceding that to be true, Mr. Davis suggests that he has the right under the order by the court to shift all accountability for the sums paid in compliance therewith to the marshal; *i. e.*, that the bare receipts of the marshal for the gross sums so paid are his sufficient warrant.

The suggestion is somewhat complicated by the circumstance that Mr. Davis, in fact, paid the sums to the marshal as salary due for services performed (subject only to the general restriction as to *maximum*.) But, waiving this special matter, nothing has been suggested to me or occurs to show that an order of the court can have the effect of shifting Mr. Davis's responsibility for this money to another official, who, in the absence of such order, was not competent to receive it.

It has already been said (in the former opinion) that the

Restored Naval Officer—Pay of.

order is no warrant for the payment in the special character in which it was required (*viz.*, as salary); it seems to be quite as clear that it is no warrant for the payment in the light now on second thoughts suggested (*viz.*, as a gross sum *advanced* to the marshal, to be accounted for at the Treasury by him.)

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

Hon. R. W. TAYLER,

First Comptroller of the Treasury.

Approved.

ALPHONSO TAFT.

RESTORED NAVAL OFFICER—PAY OF.

B., a retired naval officer, was dismissed from the Navy by order of the Executive on the 30th of December, 1865. In May, 1876, upon his application for trial by court-martial, made under section 12 of the act of March 3, 1865, chap. 79, a court was awarded, which, in June, 1876, pronounced him innocent of every charge and specification, and, the dismissal being thereby annulled, he was ordered (June 5, 1876) to be restored to the retired list. Between the date of his dismissal and the date of his restoration he had not demanded in writing from the Secretary of the Navy, as often as once in six months, a trial; but pay is claimed by him for this period: *Held* that the right of the claimant to pay is governed by section 2 of the act of June 22, 1874, chap. 392, under the provisions of which he is not entitled to more than "pay as on leave for six months" from date of dismissal.

It was competent to Congress to modify, in the matter of pay, the effect of a restoration under the act of 1865.

DEPARTMENT OF JUSTICE,

July 21, 1876.

SIR: Yours of the 13th instant, addressed to the Attorney-General, incloses for consideration certain papers connected with the case of Julius S. Bohrer, a retired master of the Navy, and asks for an opinion as to the validity of his claim for pay from the date of his dismissal to the date of his restoration to his said office.

It appears that, in consequence of a report by a naval court of inquiry, Mr. Bohrer was dismissed from the Navy by the

Restored Naval Officer—Pay or.

Secretary on the 30th of December, 1865; that four days after dismissal he made application to the Secretary for trial by a court-martial; that prosecution by him of the matter of his restoration was impeded by extreme and continued illness, caused by wounds, &c., although from time to time he made other efforts for such restoration; that in May, 1876, upon his application, a court-martial was awarded; and that in June last such court declared him innocent of every charge and specification, and pronounced the dismissal of December, 1865, null and void. Accordingly, by General Order 210, (June 5, 1876,) the Secretary of the Navy also declares such dismissal void, and ordered Mr. Bohrer to be restored to the retired list. The question is, whether he is entitled to pay from the time of his dismissal.

The act of 1874, chap. 392, (18 Stat., 192,) prohibits the accounting officers of the Treasury "from making any allowance to any officer of the Navy who has been, or may hereafter be, dismissed from the service and restored to the same under the provisions of the act of 1865, chap. 79, sec. 12, to exceed more than pay as on leave for six months from the date of dismissal, unless it shall appear that the officer demanded in writing, addressed to the Secretary of the Navy, and continued to demand as often as once in six months, a trial as provided for in said act" of 1865.

The act of 1865, so referred to, provides that in case officers of the Army or Navy thereafter dismissed by the President shall apply in writing for a trial, the President shall convene a court-martial to try such officer on the charges for which he was dismissed; and if such court shall not be convened within six months of the application, or if, being duly convened, it shall not award dismissal or death as punishment, the order of dismissal shall be void.

Mr. Bohrer admits that he did not demand a trial as often as once in six months after his dismissal, and seeks to excuse himself therefor by pleading his extreme illness during a large part of that time. Such illness would, if continuous, be a strong reason why Congress should intervene to relieve him from the provisions of that act; but, failing such intervention, no officer of the Executive Department can give consideration to any other equities for avoiding the effects of the

Restored Naval Officer—Pay or.

act than those set down therein. This rule of administration is well established. (2 Wheat., 25; 9 How., 522.)

It is urged, however, that the statute of 1874 was not intended to apply to such a case, inasmuch as it would be indecent to suppose that the legislature intended to divest a vested right of property; the suggestion being, that under the statute of 1865 (above) Mr. Bohrer possessed, from December, 1865, up to June, 1876, certain rights (to pay, &c.) which were none the less real for requiring to be disentangled and asserted by sentence of a court-martial; and that by that statute the sentence and order of June, 1876, rendered his dismissal void *ab initio*, so that at all times since December, 1865, he has, in contemplation of law, been an officer of the Navy. This suggestion requires that the situation of Mr. Bohrer, in regard to his office at the time of the passage of the statute of 1874, shall be closely considered.

Mr. Bohrer, for reasons more or less to be deplored, and for which he may be morally not accountable, did not set on foot the means provided by law for his relief until 1876, nearly eleven years after his dismissal. In dealing with his case all executive officers of the Government are obliged to attribute this delay to his own voluntary action.

During that delay Congress passed an act intended to operate upon persons in his situation—I say an act intended so to operate; for I think that the words of the act of 1874 are so specific as to exclude all possibility of a contrary construction.

As to the competency of such legislation, I remark that if in 1874 Congress had chosen to repeal the act of 1865 entirely, Mr. Bohrer would have had no legal cause of complaint. In that case Mr. Bohrer would have continued a private person from the date of his dismissal in 1865. By the act of 1865 Congress had chosen to allow to officers dismissed by competent authority (8 Opin., 230) an opportunity of avoiding such dismissal. I know of no principle of law to prevent Congress from repealing that statute as to all persons who had not actually availed themselves of it at the time of its repeal. In that case such persons would have remained dismissed.

If Congress could have repealed it entirely, without leaving to such persons redress before the executive or judicial tri-

Use and Occupation—Claim for.

bunals of the nation, *a fortiori* it could have modified it with the same result.

In the present case, instead of depriving Mr. Bohrer entirely of the privilege possessed by him at the passage of the act of 1874—*i. e.*, of calling for a court-martial, and thereby obtaining reinstatement *ab initio*—Congress has only modified the effect of such reinstatement in the matter of pay.

I think such legislation entirely competent. Its propriety is a matter for the legislature alone.

Upon the whole, therefore, I conclude that Mr. Bohrer's claim for pay, otherwise than as defined by the act of 1874, is inadmissible.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE NAVY.

Approved.

ALPHONSO TAFT.

USE AND OCCUPATION—CLAIM FOR.

The act of February 21, 1867, chap. 57, does not forbid the settlement of a claim for the use and occupation of real estate by the military authorities or troops of the United States after the termination of the war, though such use and occupation may have commenced during the war and continued down to the period covered by the claim.

Seems that in the State of Mississippi the war ended on the 2d of April, 1866.

DEPARTMENT OF JUSTICE,
July 22, 1876.

SIR: Yours of the 15th instant, addressed to the Attorney-General, submits for his consideration a brief of facts in the claim of A. Burwell, of Vicksburg, Miss., and in connection therewith asks for an opinion upon the following questions:

"1. Whether, in view of the act of February 21, 1867, the accounting officers of the Treasury can settle a claim for use and occupation of claimant's property by the Army for that portion of time during which the occupation continued after the end of the war?"

Use and Occupation—Claim for.

"2. If they can make such settlement, then at what date did the war end in Mississippi for the purposes of such settlement?"

From the brief of facts inclosed, I find that the use and occupation referred to began in 1863 and ended in 1867; and that the claim now preferred is for so much thereof as took place since the restoration of peace.

1. The act of February 21, 1867, (14 Stat. 397,) referred to in the first of the above questions, so far as material here, in effect prohibits the settlement of claims for the occupation of real estate by the military authorities or troops of the United States where such claim originated during the war for the suppression of the Southern rebellion in a State declared in insurrection by the proclamation, &c.

This prohibition requires two conditions in order to its operation, viz: that the claim shall have originated (1) during the war, and (2) in a rebellious State. It does not affect claims which during the war originated in loyal States, or claims which since the war originated in States formerly rebellious.

That which is spoken of as originating, &c., is the claim. Claims originate from facts. Claims for use and occupation of real estate arise out of such use and occupation alone; and, to speak more distinctly, out of that part of the use and occupation which is covered by the claim. If the use and occupation have been for a series of days or months or years, a claim for use and occupation during the latter part of the series does not originate out of any other part of such series than that covered by the claim. An action for use and occupation during July originates in the use and occupation of July alone, no matter whether such use be a continuation of a use begun in June or previously.

The circumstance that the time covered by the claim is only a part of a longer continuous period for which a claim might have been made forms, in general, no objection to such selection.

It would be otherwise if the action were based upon a lease for a term of years. In such case the claim for any portion of the term would originate in the original contract, and if that had been made during the war, the claim would have origi-

Attorney-General.

nated during the war. I therefore answer your first question affirmatively.

2. Since the decision in the case of The Protector, (12 Wall., 700,) it seems that all Departments of the Government are bound to regard peace as having been restored in the State of Mississippi on the 2d day of April, 1866. That case has been followed in other decisions, so that the intimation in the previous case of Anderson, (9 Wall., 56,) i. e., that peace was not restored until the 20th of August, 1866, must be regarded as overruled.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

ALPHONSO TAFT.

ATTORNEY-GENERAL.

The Attorney-General cannot with propriety give an official opinion to the head of a Department upon the question whether it is expedient for him to prosecute an appeal in a matter of public interest pending before another Department.

DEPARTMENT OF JUSTICE,
July 24, 1876.

SIR: Yours of the 21st instant, addressed to the Attorney-General, states that you have appealed from a decision of the Acting Commissioner of the General Land-Office, made May 19, 1876, upon the Mora land grant, and transmitting certain papers therein and requesting the Attorney-General to consult other papers to be found in the Department of the Interior, asks for an opinion as to "the expediency of prosecuting the appeal thus formally taken."

I apprehend that it is very doubtful if the Attorney-General can give an official opinion as to whether it be expedient for one Executive Department to prosecute an appeal in a matter of public interest pending before another Executive Department.

Whilst it may turn out that such appeal will be unsuccess-

Distribution of Prize Funds.

ful, it may still be expedient that the case of the United States shall be pressed vigorously and carried before the highest authority in the Department. The gravity, difficulty, and other circumstances of the case may require such prosecution, although the officer in charge of it may entertain doubt as to final success.

As it seems, therefore, that the propriety of such prosecution is not always a matter of law, but may well be one merely of official discretion, it does not fall within the competency of this Department to give advice thereupon. (Rev. Stat., sec. 356.)

I will add, likewise, that as the questions of law that may emerge in the administration of the case which you mention will be questions of law in the Department of the Interior and not in the Department of War, it would be to forestall probable action by the latter Department asking for the opinion of the Attorney-General upon such questions, if they were to be considered and decided in the way now proposed.

I venture to believe that a consideration of the above suggestions will satisfy you that the position herein assumed is proper, and is entirely consistent with an earnest wish to comply with the official duty which I owe to your Department.

With great respect, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved.

ALPHONSO TAFT.

DISTRIBUTION OF PRIZE FUNDS.

Under a decree, in prize, of the district court of the United States for the southern district of Illinois, passed at its June term, 1868, certain moneys were paid into the Treasury to the credit of the naval pension fund. At its November term, 1869, in a proceeding for the reformation of that decree, due notice of which was given to the proper representative of the United States in the cause, the court modified its decree so far as to require the said moneys to be distributed to the captors named therein: *Held that the decree as thus modified is the only final decree of the court in the cause, and should alone be regarded as the*

Distribution of Prize Funds.

decree of the court, for the purpose of distribution of the funds, within section 16 of the act of June 30, 1864, chap. 174, (sec. 4641 Rev. Stat.,) and that it is the duty of the Secretary of the Navy, and of all officers of the United States concerned, to give effect thereto.

Opinions of Attorney-General Akerman and Attorney-General Williams in same matter, (13 Opin., 299, 348; 14 Opin., 524,) considered, and the apparent conflict between the view there taken and that here adopted explained by a material difference between the state of facts as then and that as now presented.

DEPARTMENT OF JUSTICE,

July 27, 1876.

SIR: Yours of the 12th instant, addressed to the Attorney-General, incloses a report of the Naval Solicitor upon an application by Miss Clara B. Jordan, of Cincinnati, and asks for a reply to the following questions:

“1. Should I, as trustee of the naval pension fund, be justified in transferring from that fund to the prize fund, for distribution as military salvage, moneys paid to said naval pension fund under a decree in prize issued in 1868, by the United States district court for the southern district of Illinois, said court having at another and subsequent term, in 1869, so modified that decree as to direct that said moneys should be distributed as military salvage to the captors named in said decree?

“2. Should the said court, with my assent, now reopen said cases and grant a decree in salvage, would I be justified under such decree in making the transfer and distribution mentioned in the foregoing question?”

1. The former question involves a reconsideration of two opinions given heretofore by Attorney-General Akerman and Attorney-General Williams upon the obligatory effect of a certain rectification, at November term, 1869, of a decree in prize passed at June term, 1868, in the district court of the United States for the southern district of Illinois, in a case entitled *The United States vs. Nine hundred and twenty-four Bales of Cotton*, (13 Opin., 299, 348; 14 Opin., 524.) Those opinions concur in holding that a court of prize has no power to alter its decrees after the lapse of the term in which such decree was entered.

From the statements contained in those opinions, I understand the conclusions in question to have been reached in the

Distribution of Prize Funds.

absence of a fact which is now brought forward, and which seems to me virtually to reverse the effect of such statements.

I admit that in the above case this Department is bound by the decisions above referred to whenever the case recurs upon the same state of facts. (13 Opin., 33.) That state of facts was, the reformation of a decree for distribution in prize, after the term had passed, *no regular proceedings therefor and no notice to the parties appearing*. The answer was, that the court had no power under such circumstances to reform its decrees.

Now, however, the fact is brought forward that the United States were notified of such proceedings for reformation, and took no steps to resist them or to set them aside.

It is said, in the first place, that as a district court of the United States is what is known technically as a *superior court*, it will be presumed, except in applications to an appellate court to *reverse* its action, that where the *subject matter was within its jurisdiction* its proceedings have been regular; *ex. gr.*, that it had acquired *jurisdiction of parties*. This presumption is fortified in the present case by the statements of Mr. Taylor, and Mr. Bowen, the clerk. Mr. Rosette's statement is substantially the same as that of Mr. Bowen, and Mr. Bluford Wilson said to me orally that he has no particular recollection about the point.

It seems to me that any present consideration of the first question above must take for granted that the decree at November term, 1869, was made after due notice to the United States. This is according to the strong presumption, and is fortified by such evidence as can be commanded.

Whether in the United States a court of admiralty loses the power of *rectifying its decrees at will, by their entry or enrollment*, as seems to be originally the rule with all courts that to some extent administer the civil law, or whether such power is determined by the *lapse of the term*, as in common-law courts, is not material in discussing the power exercised as above in November, 1869, because under either test the district court of Illinois, as has been held above, had lost an *ad libitum* control of the decree of June, 1868.

I think it admissible to put the conclusion upon the ground of the *lapse of the term*, because the statutes of the United

Distribution of Prize Funds.

States, which provide that such courts shall be *always open*, limit that condition of things to certain purposes, amongst which is not that of passing or otherwise dealing with *final decrees*. (Act of 1842, chap. 188, Rev. Stat., sec. 574.)

Lapse of the term or enrollment deprives courts of control over their decrees *not absolutely* but *sub modo*. After either event such action can be reversed or modified only with notice to those interested. In courts of admiralty regularly a *libel* of review should be filed. All that is essential, however, is fair notice to the parties. In technical language, lapse of the term does not deprive a court of admiralty, or generally any court, of *jurisdiction over the subject matter of rectification of its decrees*, and if in any particular case it has acquired in addition *jurisdiction over the parties* by fair notice, all minor irregularities as to procedure, &c., cannot be regarded by other tribunals not exercising appellate jurisdiction. In such case the decree as rectified is alone the final decree in such cause, and the prior entry, so far as conflicting, is *annulled*.

Some of the cases as reported contain loose language upon the above topic—loose, because speculative or inadvertent; but the vast preponderance of authority is in accordance with what has just been laid down, (see *The Illinois*, 1 Brown's Adm. Rep., 13,) and has the advantage of being uniform in all systems of courts and according to natural justice.

Under the presumptions, and the state of facts as to notice to the proper representative of the United States in the above litigation—viz, the United States attorney for southern Illinois—I have no doubt that the rectification at November, 1869, was properly accomplished, and that such rectification is the *decrees of the court* within section 4641 of the Revised Statutes, (act of 1864, chap. 174,) and therefore is the only decree which controls the distribution of the *net amount paid into the Treasury of the United States* in accordance with such section.

If the decree of June, 1868, had been appealed from immediately, the accounting officers of the United States would not have obeyed it. As it was not appealed from, they took it for granted that it would stand, and so conformed their action to it. If it had been appealed from and reversed *subsequently*, there is no doubt that the decree of reversal would

Transmission of Government Telegrams.

have been the decree of the court within the above section. This is no less true of the rectification before me, which has been accomplished substantially in conformity with law.

I therefore answer the former question by saying that it is the duty of the Secretary of the Navy (and all other officers of the United States concerned) to give effect in this case to the decree of November, 1869, which by the act of 1864 (above) is the only authority for a legal statement of public accounts of this fund.

I suppose that the above answer renders it unnecessary to consider the second question propounded by you.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE NAVY.

Approved.

ALPHONSO TAFT.

TRANSMISSION OF GOVERNMENT TELEGRAMS.

In transmitting Government dispatches from Leavenworth, Kans., to points in Colorado, the Western Union Telegraph Company has not the option to send them either by way of Denver (over the telegraph line constructed along the Kansas Pacific Railroad) or by way of Pueblo, (over the telegraph line constructed along the Atchison, Topeka, and Santa Fe Railroad.)

The option of selecting the route is with the Government; and where no option is expressed thereby, the company is bound to send the dispatch over the cheaper route.

The acceptance by the said company of the rates established by the Postmaster-General under the act of July 24, 1866, chap. 230, was not a waiver of the right of the company to change its local tariff rates over the telegraph line constructed along the Kansas Pacific Railroad between Lawrence and Denver.

DEPARTMENT OF JUSTICE,

July 28, 1876.

SIR: In yours of the 20th instant, addressed to the Attorney-General, the following case and questions are stated as calling for his opinion:

The telegraph lines upon those portions of the public domain granted to the Kansas Pacific Railroad Company, and

Transmission of Government Telegrams.

to the Atchison, Topeka and Santa Fé Railroad Company, (acts July 1, 1862, and March 3, 1863, 12 Stat., 489, 772,) are at present operated by the Western Union Telegraph Company.

The act which granted public lands to the Kansas Company (above) provides (as do all acts making like grants to railroad companies secured by United States bonds) for a telegraph line in conjunction with the railroad, and after allowing the company to fix its rates for the transmission of government dispatches—so that they be fair and reasonable and do not exceed rates charged to private parties for similar service—enacts that one-half of such compensation “be applied to the payment of the bonds issued by the Government in aid of the construction of said road.” (Acts July 1, 1862, and July 2, 1864, 12 Stat., 489; 13 Stat., 356.)

By the above act of July 2, 1864, (sec. 15,) it is also provided that the several companies authorized to construct the roads therein mentioned (including the Union and the Kansas Pacific Railroad Companies) shall operate their road and telegraphs for all purposes of communication, &c., “so far as the public and the Government are concerned, *as one continuous line.*”

The act which granted public lands to the Atchison company, above, (as are all acts making like grants without United States bonds,) is silent as to a telegraph line in connection therewith, and also as to the rates for transmitting Government dispatches over any such line as might afterwards be constructed. This line, therefore, falls within the provisions of the second section of the act of July 24, 1866, (14 Stat., 221,) it having accepted the rates which upon the 22d of September, 1873, the Postmaster-General established in accordance with such provisions.

That portion of the Western Union Telegraph line which lies in Kansas, between Leavenworth and Lawrence, is constructed along the line of the Leavenworth branch of the Kansas Pacific Road, and is an extension of that road not contemplated in the original grant of lands above mentioned.

In the above connection three questions arise:

“1. Is it optional with the Western Union Telegraph Company to transmit Government dispatches from Leavenworth, Kans., to points in Colorado Territory, either by way of

Transmission of Government Telegraphs.

Denver, Colo., over the telegraph line constructed along the route of the Kansas Pacific Railroad Company, or by way of Pueblo, Colo., over the telegraph line constructed along the route of the Atchison, Topeka, and Santa Fé Railroad, as said telegraph company may elect ?

“ 2. Did the Western Union Telegraph Company, by accepting the rates established by the Postmaster-General, (as provided for by the act of July 24, 1866, 14 Stat., 221,) waive the right to change their local tariff rates for the transmission of Government dispatches over the telegraph line constructed along the route of the Kansas Pacific Railway ?

“ 3. Is there a sufficient privity of contract between the said telegraph company and the United States (provided for by the act of July 24, 1866, 14 Stat., 221) to enable the Government to compel the telegraph company to transmit the dispatches of the Quartermaster’s Department of the Army on public business from Leavenworth, Kans., to points in Colorado, via Pueblo, over the shorter telegraph line constructed along the route of the Achison, Topeka and Santa Fé Railway, at the rates of compensation established by the Postmaster-General ?

From the statement made above, I gather that a dispatch ransmitted from Leavenworth, in Kansas, to Pueblo, in Colorado, passes (1) to Lawrence along a branch of the Kansas Pacific Railway, which branch was constructed subsequently to the passage of the act granting lands to the principal road, such construction not being contemplated in that act ; (2) thence to Topeka, along a part of the Kansas Pacific Railway, and thence, *in the alternative*, EITHER (3) to Denver, still along the last-mentioned railway, and (4) thence to Pueblo, along the Denver and Rio Grande Railway ; OR (3) from Topeka to Pueblo directly, along the Atchison, Topeka and Santa Fé Railway ; also, that in either alternative the telegraph line for the whole distance is operated, in communication, by the Western Union Telegraph Company ; and that the route by the Atchison, Topeka and Santa Fé Railway is the shorter and cheaper.

I premise my answer to the above questions by saying that I do not agree with the suggestion of the Second Comptroller of the Treasury, contained in the paper from which the above

Transmission of Government Telegrams.

facts are taken, that the above branch of the Kansas Pacific Railway from Leavenworth to Lawrence is bound by the conditions which the land-grant act applies to the principal road. The opinion of Attorney-General Akerman, quoted by the Second Comptroller, (from 13 Opin., 536,) does not cover such a case. I need not discuss the matter. The opinion quoted is sound law upon the facts which called it forth; and I refer to an opinion in 14 Opinions, 428, to show that a branch, or extension, of a road, constructed under legislation *subsequent* to that which authorized the principal road, is not *ipso facto*, or in the absence of express statutory provisions, bound by conditions upon gifts to the original road.

Ordinarily, therefore, upon the facts stated above, the United States, for a dispatch from Leavenworth to Pueblo, are bound to pay *via Denver*, (1) *circular* rates to Lawrence, (2) thence tariff rates to Denver, and (3) thence *circular* rates to Pueblo; or *via Atchison, &c., Railway*, (1) *circular* rates to Lawrence, (2) thence *tariff* rates to Topeka, and (3) thence *circular* rates to Pueblo.

I proceed to answer the questions stated above:

1. The Western Union Telegraph Company have no such option as is suggested in the first question. On the contrary, the United States, as senders of the dispatch, have an option of selecting the route by which it shall go; and when such selection is expressed, the duty of the company to comply is just what it would be if the line selected were the only one under its control; and, even if the United States have expressed no option, I am strongly inclined to think that the company would be held (by an *implication* of a promise to accomplish the result required by no more than necessary labor) to an agreement to charge no more for the dispatch than it was fairly worth to send it; that is, what it was worth to send it by the cheaper line. For in either case the *article* furnished to the United States is the same, *i. e.*, a dispatch delivered at Pueblo; whereas if the company were allowed as a matter of mere option to transmit such dispatch by the more expensive line, it would be equivalent to permission to charge their customers for labor unnecessarily expended.

2. I am of opinion that the act mentioned in the second question did *not* amount to a *wavier* as suggested.

Railroad Grant—Homestead Entry.

The acceptance by the Western Union Telegraph Company of the terms of the Postmaster-General, as by the second section of the act of 1866, chap. 230, (14 Stat., 221,) (called herein *circular rates*,) applied to only so much of the lines operated by them as are included in the first section of that act; *i. e.*, to all of the lines mentioned above, excepting that from Lawrence to Denver. It is, therefore, no waiver of the rights of the company as to the line excepted.

3. I have already substantially answered the third question whilst discussing the first. I therefore only repeat that I am of opinion that the United States, under the above statements, can compel the telegraph company to transmit its dispatches from Leavenworth to points in Colorado, via Pueblo, over the line along the Atchison, &c., Railway at circular rates.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

ALPHONSO TAFT.

RAILROAD GRANT—HOMESTEAD ENTRY.

Where a homestead entry was made in good faith by an actual settler within the limits of a railroad grant after a map of the definite location of the road was filed, but before notice of the withdrawal of the lands covered by the grant was received at the local land office, (a delay of about twelve months having occurred in giving the notice,) and all the requirements of the law in regard to such an entry were complied with by the homesteader: *Held* that the case is within the provisions of the act of April 21, 1876, chap. 72, confirming certain pre-emption and homestead entries.

DEPARTMENT OF JUSTICE,

August 4, 1876.

SIR: In yours of the 29th ultimo, addressed to the Attorney-General, is stated a case of conflict between an entry made by one Edward Plonch and the land grant to the State of Kansas, on account of the Kansas and Neosho Railroad Company, by virtue of the act of July 25, 1866, (14 Stats., 236.) It seems that after that company had filed a map of its survey a delay of about twelve months, *viz.*, until June 12, 1867, unaccountably occurred in giving notice of the cor-

Railroad Grant—Homestead Entry.

responding withdrawal of the lands from market. In that interval (*i. e.*, on the 28th of October, 1868) Plonch made a homestead entry of one hundred and sixty acres within such grant, and has since duly observed all requirements of the law in regard to such entries, and is "an actual settler in good faith."

Upon the 21st of April last Congress passed an act entitled "An act to confirm pre-emption and homestead entries," &c., which, amongst other things, provides: "That all pre-emption and homestead entries, &c., of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office, &c., &c., and where the pre-emption and homestead laws have been complied with, &c., &c., shall be confirmed, and patents for the same shall issue to the parties entitled thereto."

In this connection you ask whether the provision above quoted is applicable to the case of Plonch, and, more specifically, whether lands situated as were those granted for the Neosho Railroad Company after its map of survey had been filed, and before notice of their *withdrawal*, can be termed *public lands* within the meaning of such provision.

The question is *not* whether lands in that situation are *in general* "public lands," but whether, from the context and other means of interpreting the above statute, it appears that Congress there intended by the phrase "public lands" to designate lands so situated.

I think it plain that Congress, in the above act, used that phrase in a *special sense*, virtually defined in the context as being "lands within the limits of any land-grant prior to the time when notice of their withdrawal is received at the local land office," &c., and therefore I conclude that the case of Plonch is included therein.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved.

ALPHONSO TAFT.

INDIAN CONTRACTS—APPROVAL OF.

In 1874 R. entered into a contract with John Ross, chief of the Eastern Band of Cherokees, to prosecute certain claims and suits, which were divided into six distinct classes, for a certain percentage on the amount recovered. The contract was approved by the Commissioner of Indian Affairs and by the Secretary of the Interior as to one of the classes, (the sixth,) allowing the compensation fixed therofor by the parties: *Held that the contract was separable into parts, and that the approval of one of the parts validated the contract pro tanto.*

At the same time R. also made a like contract with certain other chiefs and headmen of the same band of Indians, embracing precisely the same subject-matter as the first contract, but in which the compensation was "not to exceed" 20 per cent. of the amount recovered. The approval of this contract by the Commissioner and Secretary allowed a compensation of 20 per cent.: *Held that the approval was not in conformity to the requirements of section 2103 Rev. Stat.*

The approval operates by relation to the date of the contract, and has the same effect as if it had then been given. Hence, a claimant thereunder is not, under section 2104 Rev. Stat., confined to acts of service done subsequently to the date of the approval, but may show acts done at any time after the date of the contract.

Whatever compensation is found due R. under the contract with John Ross is "expense" or "liability" of the said Eastern Band, within the meaning of the act of March 3, 1875, chap. 132, and is allowable from the fund specified therein.

DEPARTMENT OF JUSTICE,

August 4, 1876.

SIR: Yours of the 27th ultimo, addressed to the Attorney-General, presents for his opinion the following case and questions:

"In 1874 W. W. Rollins entered into two contracts, one with John Ross, as chief of the Eastern Band of Cherokees, and the other with numerous individuals purporting to be principal chiefs and headmen of said band."

[So far as is important in this connection, the former of the contracts, dated May 15, 1874, after referring to certain claims of the Eastern Band, &c., against the United States, and also to the pendency of certain suits brought by them in the circuit court of the United States for the western district of North Carolina, appoints W. W. Rollins agent for such band in respect to both the claims and the suits; he binding him-

Indian Contracts—Approval of.

self to prosecute all such claims and suits which are enumerated therein, as:

1. Sums due under the treaty of 1835-'36, and an act approved July 29, 1848, &c.
2. Shares of the proceeds of a sale of the *neutral* lands, under treaty of July 19, 1866.
3. Reservation, pre-emption, and spoliation claims under treaties of 1835-'36 and 1846.
4. Money due for misappropriation, &c., under treaty of 1835, &c.
5. Money due under act of May 29, 1872.
6. "*All suits now pending in the courts of the United States in behalf of the Eastern Band of the Cherokees,*" &c.

For such service Rollins was to receive 20 per cent. of such amounts as he should recover because of *any or all of the said claims, or in said suits now pending, or which may hereafter be instituted, or because of any award made upon a reference of such suits; and if such award should be of real or other property, then the compensation was to be at the same rate upon its valuation, &c.*

The *approvals* of such contract by the Commissioner and Secretary were dated respectively June 24, 1874, and August 25, 1874, and were confined expressly to its *sixth section*, allowing a compensation of 20 per cent. upon any amount recovered thereunder.

The contract between Rollins and the chiefs and headmen, referred to above is substantially a copy of that just mentioned, except that the compensation was specified as one "*not to exceed 20 per cent.* to be allowed by the Commissioner of Indian Affairs out of such amount as he (Rollins) may collect."

The corresponding *approvals* thereof by the Commissioner, &c., award to Rollins *a compensation of 20 per cent.*

Having, as above, substituted at this point the substance of the *contracts* and *approvals*, so far as material here, in place of a mere reference thereto, I proceed to give the remainder of your communication as follows:]

"I invite your attention to the fact that in the second contract the compensation to be paid said Rollins is stipulated

Indian Contracts—Approval of.

'not to exceed 20 per cent., to be allowed by the Commissioner of Indian Affairs out of such amounts as he may collect,' &c.

"At the time said contracts were entered into, suits were pending in the circuit court of the United States for the western district of North Carolina, which were instituted in the spring of 1873 by the district attorney of said district under section 11 of the act of Congress approved July 15, 1870, (16 Stat., 362.)

"Prior to the approval of the contracts, endorsed thereon by the Acting Commissioner of Indian Affairs and Acting Secretary of the Interior, on the 17th of June, 1874, the subject-matter of said suits was referred, by stipulation of the parties, to the arbitrators, who made their award under date of October 24, 1874, and the same was confirmed by the order of the court at the following November term thereof.

"It will be observed that said Rollins signed the submission, as attorney for the Eastern Band of Cherokee Indians, but by what authority is unknown to this Department; the contract under which he claims for services rendered the Indians in said suits not having been approved until long after that date.

"In March, 1875, Messrs. Rollins and Presbrey presented a claim to this Department for \$20,000, on account of services rendered under said contract. The claim was referred to the Commissioner of Indian Affairs by my predecessor, dated April 23, 1875, a copy of which is transmitted herewith, marked No. 4.

"Pursuant to the direction of the Secretary of the Interior, the claim was referred to the Board of Indian Commissioners, who reported thereon in favor of allowing to the claimants the sum of \$5,200, a copy of which is herewith transmitted, marked No. 5, and may be found in the seventh annual report of said board at page 18. It will be observed that the approval of the board was for the payment of said sum in full of all demands under said claim."

[I remark in passing that the circumstance that the board gave their approval of a certain sum as *in full*, &c., is deprived of its importance by the subsequent action of the Secretary upon the same matter. He ratified that allowance expressly *without prejudice*, &c. The judgment of the board was not

Indian Contracts—Approval of.

binding upon the Secretary, and the view of his modification of it has no effect now.]

“The Commissioner of Indian Affairs thereupon proceeded to allow said claimants the said sum, directing the same to be paid out of the appropriation for the North Carolina Cherokees, contained in 18 Stats., p. 447. A copy of said account, with the endorsements thereon, is herewith transmitted, marked No. 6.

“Directly after the appointment of the present Secretary of the Interior, said claimant again applied for the payment of a further sum upon said contracts, upon which application the Commissioner of Indian Affairs reported in favor of the allowance of \$9,600, a copy of which report is herewith transmitted, marked No. 7, in which recommendation the Secretary of the Interior refused to concur, and held the contracts invalid for reasons stated in his letter of November 24, 1875, a copy of which is herewith transmitted, marked No. 8.

“Since that date the Secretary has ordered the case reopened and granted a rehearing to said claimants. Their claim is now pending before him for decision. I therefore desire your opinion upon the following questions:

“1. Was the contract between John Ross and claimant Rollins duly approved by the Commissioner of Indian Affairs and the Secretary of the Interior, as required by law?

“2. Was the approval as indorsed by the Commissioner of Indian Affairs and the Secretary of the Interior upon the contract made by the chiefs and headmen such an approval as is required by section 2103 of the Revised Statutes?

“3. If the contracts are valid, can the claimants be lawfully paid for any services rendered by said Rollins prior to the approval of said contracts by this Department?

“4. Should the claimants, in making proof of services rendered under said contracts pursuant to section 2104, be confined to such acts of service as had been performed subsequently to the date of the approval of the contract?

“5. No money having been recovered by the Indians, is it competent for this Department to authorize and direct payment upon the contracts in anything besides land?

“6. If a valid demand shall be found to exist in favor of the claimants which may be paid in money, can such payment be

Indian Contracts—Approval of.

lawfully made from the appropriation of March 3, 1875! (18 Stat., 447.)

"In addition to the papers already enumerated, reference may be had to copies of papers bearing more or less directly upon the case included in the appendix to the brief above mentioned, and at the request of the claimants I also inclose Executive Document No. 169, Forty-third Congress, second session, and a copy of an affidavit made by said Rollins September 17, 1875, filed with the Commissioner of Indian Affairs, which copy is marked No 9."

1. In answer to the first of the above questions, I have to say that the above contract with Ross *was duly approved*.

Rollins contracted to do *six distinct things upon a consideration apportioned to each*. The authorities hold, uniformly, I believe, that such a contract is *separable*. Therefore, in case it needs approval or ratification, this may be limited to one of such things alone, or to more than one, or may extend to all, with the effect of validating the contract for the part approved and no more.

2. I am of opinion that the contract with the chiefs and headmen *was not approved* as required by section 2103.

That which by such section is to be *approved* is an agreement already *in writing*, wherein in all cases the rate per centum of the fee must be stated. There must be such a statement of *that rate* as may be approved by the Secretary and Commissioner. A statement that the fee *shall not exceed 20 per cent.* is no statement of the rate. It leaves to subsequent settlement, and therefore to the chances of dispute and litigation, the establishment of the rate at 15, or 10, or other per cent. less than 20. This subsequent dealing about the rate is what the statute means to avoid. The contract must exclude any apprehension thereof at the time when presented for approval. This was not done in the present case.

Besides, the contract was not approved *as made*. The chiefs, &c., reserved to the parties the right of fixing thereafter upon the particular rate *not to exceed*, &c.; but the Commissioner and Secretary, in their *approval, fixed* that rate at 20 per cent.; that is, fixed it at a rate greater perhaps than the chiefs would have obtained. The last paragraph of section 2103 of the revisal suggests that the Secretary and

Indian Contracts—Approval of.

Commissioner may fix the rate of the fee at a sum *less* than that agreed to by the Indians—upon the idea, I suppose, that if (say) 20 per cent. be actually named in the contract, such agreement, so far as it affects the Indians, (whose interests alone are of concern to the Secretary and Commissioner,) is also an agreement to pay anything *less*, and so may be approved for less, leaving it to the other party to ratify or refuse such modification. That, however, is a different case from the one before us, in which the approval prevents the Indians from availing themselves of less rates than contemplated in the contract.

3. It seems to me that the claimants may be lawfully paid for services by Rollins prior to the *approval* of the contract.

The approval operates by *relation*. Such I think is *prima facie* the operation of ratifications and approvals in general where the law which renders them necessary contains no specific provision to the contrary. Generally these have the same effect as if the assent therein given were contemporary with the matter ratified. Although the writing does not bind until after the approval is given, nevertheless then *retrahitur*, &c., as the authorities say. There is an exception to this rule—*where approval is legislation*—as in case of approval of bills by the President; but the reason for such exception is obvious, and does not extend to private transactions.

4. I answer the fourth question by saying that, as already suggested, the claimants should *not*, under section 2104, be confined to acts done subsequently to the date of the *approval*. They may show acts of service done at any time after the date of the contract, i. e., after May 15, 1874.

5 and 6. So far as I am informed, the act of March 3, 1875, (18 Stat., 447,) confers upon the Department of the Interior its only authorization for paying the claimants in anything but a share of the land recovered. In case a valid demand shall be found to exist in favor of the claimants payable in money, it seems that Congress intended that it should be provided for under that act, which expressly directs the fund therein specified to be used for, amongst other things, *the payment of such costs, charges, expenses and liabilities attending their recent litigation in the circuit court of the United States*.

WIDOW PENSIONER.

for the western district of North Carolina as the Secretary of the Interior may determine to be properly chargeable to them. Whether any question arises upon the extent of that fund when compared with the purposes to which by the above act it is devoted, I am not informed. Supposing none such to exist, I answer that whatever compensation is found due to Rollins under the contract with Ross, as approved, (*although it may not be costs,*) is certainly *expense or liability* of the Eastern Band, &c., &c., within the words of the act of 1875, chap. 132, above cited.

In conclusion I add that, although I have read the papers contained in the appendix referred to by you, I have not considered them in coming to the conclusion above stated, inasmuch as this Department relies for *facts* upon the findings made by the Department which requires its opinion. It has no power to decide questions of fact arising in the administration of other Departments. You will understand this paper, therefore, as intimating no opinion upon any such matter connected with the above transaction.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved.

ALPHONSO TAFT.

WIDOW PENSIONER.

The words "pensioner" and "person entitled to a pension," in section 4718, Rev. Stat., include a widow pensioner.

Held, accordingly, that where a widow pensioner died, leaving an "accrued pension," no child surviving, the person who bore the expenses of the last sickness and burial of the deceased is entitled to reimbursement from such pension in case sufficient assets to meet such expenses were not left.

DEPARTMENT OF JUSTICE,
August 10, 1876.

SIR: Yours of the 5th instant, addressed to the Attorney-General, submits for his consideration the question whether the expressions "pensioner" and "person entitled to a pen-

Widow Pensioner.

sion," in section 4718 of the Revised Statutes, extend in any case otherwise within that section to a widow pensioner. Such a pensioner has died recently, leaving an "accrued pension" of \$325.33, and also owing a debt of \$64.28 "for the expenses of the last sickness and burial," and you are called to decide upon the claim of the creditor to receive this latter amount.

Section 4718 (originally the act of 1873, chap. 234, sec. 25, 17 Stat., 574) is as follows:

"If any pensioner has died or shall hereafter die, or if any person entitled to a pension, having an application therefor pending, has died or shall hereafter die, his widow, or, if there is no widow, the child or children of such person under the age of sixteen years, shall be entitled to receive the accrued pension to the date of the death of such person. Such accrued pension shall not be considered as a part of the assets of the estate of deceased, nor liable to be applied to the payment of the debts of said estate in any case whatever, but shall inure to the sole and exclusive benefit of the widow or children; and if no widow or child survive, no payment whatsoever of the accrued pension shall be made or allowed, except so much as may be necessary to reimburse the person who bore the expenses of the last sickness and burial of the decedent, in cases where he did not leave sufficient assets to meet such expenses."

The claim before you rests upon the last clause of the above section, beginning "and if no widow," &c. That clause may be traced through the act of 1873 to the act of 1868, chap. 264, sec. 9, (15 Stat., 236,) which was as follows:

"That if any person entitled to a pension has died since March 4, 1861, or shall hereafter die while an application for such pension is pending, leaving no widow and no child under sixteen years of age, his or her heirs or legal representatives shall be entitled to receive the accrued pension to which the applicant would have been entitled had the certificate been issued before his or her death."

There is no difficulty in determining that this statute disposes of the *accrued pension* in the case as well of a woman as of a man. It is an instance of compression rather than of elegance of style, but is clear.

It is suggested, however, that there is such a change of lan-

Widow Pensioner.

guage in passing to the act of 1873 as *increases* the impression arising from its words in the absence of comparison, and renders it certain that the latter applies to males only. If that be so, then the act of 1868, so far as applicable to females, may be still in force, so that in the case before us the widow's personal representative may be entitled to the whole of the accrued pension, because the act of 1873 *repeals* only so much of previous acts as is *inconsistent* with it; and, as is suggested, the act of 1868 is inconsistent with it only so far as regards males. Also the act of 1868, as so left in operation by the act of 1873, is not within the general repealing clause of the revision, because no part of that act operative at the time when the revision went into effect is embraced therein.

If, however, the rights of the personal representatives of widows under the act of 1868 have been done away with by the act of 1873, it seems that such conclusion must extend as well to make good claims of creditors like that before you.

If the act of 1873 does not operate upon pensioners of both sexes, its perusal starts at once the difficult question why the legislature should have reversed the policy of 1868 *as to males* and have preserved it *as to females*; in other words, why when males are the *primarily* meritorious persons as regards pensions, and the merits of females in the same relation are only *incidental* to those of the former, the legislature should confiscate pensions accrued to the former class in the same circumstances under which it devolves them upon the personal representatives of the latter? One would have anticipated the contrary action, if *favor* were to be shown to either.

It is true that if the law be so worded, such wording is in lieu of all reasons and a satisfaction of all official doubts. However, upon examination it appears that what has been taken to be such wording is only colorable, not real.

The distinction between the acts of 1868 and 1873 arises, I apprehend, from the absence in the latter of words equivalent to "*or her*" found twice in the former.

It seems that if the expression *he* in the last line but one quoted above from section 4718 were *he or she*, the phraseology of the act of 1868 would be substantially preserved; and that, by the same argument which establishes the meaning above assigned to the latter, it would be clear that widow pensioners

Advertisements in the District of Columbia.

are included also in the last clause of the former. In such case the grammatical solecism would be compensated by the compactness of the language.

The passage (in the interval between the dates of the above acts) of the act of 1871, chap. 71, (Rev. Stat., sec. 1,) which provides that in all future legislation "words importing the masculine gender may be applied to females, unless the context shows that such words were intended to be used in a more limited sense," sufficiently accounts for the non-appearance of the expression *or she* in the act of 1873. Whilst the context of the former clauses of section 4718 shows that the *words importing the masculine gender* there used were intended in that *more limited* (and exceptional) *sense*, there is nothing in the context of the last clause to prevent them from being there *applied* (by the general rule) *to females*; the result of the whole being the same as if the words "or her" of the act of 1868 were substantially retained (say) by inserting *or she*, as above suggested.

I therefore conclude that the reason of the thing, which points to the uniformity of dealing with the two sexes in the case supposed, is observed in the last clause of section 4718, and therefore that the claim before you should be allowed.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved.

ALPHONSO TAFT.

ADVERTISEMENTS IN THE DISTRICT OF COLUMBIA.

The joint effect of sections 853 and 3826 Rev. Stat., as regards Government advertisements in newspapers published in the District of Columbia, was to allow the compensation fixed by section 853, unless (under section 3826) that be more than is paid by private individuals for like services. But section 1 of the act of 1875, chap. 123, repeals section 3826 for every purpose connected with claims for such services.

DEPARTMENT OF JUSTICE,
August 14, 1876.

SIR: Yours of the 7th instant, addressed to the Attorney-General, calls his attention to the discrepancy between the

Advertisements in the District of Columbia.

rates payable for advertisements on behalf of the Government between sections 853 and 3826, and also to the *repealing* language used in the act of 1875, chap. 128, sec. 1, (18 Stat., 342,) in reference to section 3826, and asks what is the united effect of such sections upon a claim presented by The Republican, a newspaper of this city, for publishing by due order an advertisement for stationery for your Department.

Section 853 treats of publications on behalf of the Government of *notices in general*, and prescribes a certain compensation therefor, viz, 40 cents by the folio, &c. Section 3826 treats of *such notices* as are required to be published in the *District of Columbia*, &c., and prescribes therefor a compensation *not higher than is paid by individuals* for advertising in said paper.

I understand the joint effect of these two sections to be that papers in the District of Columbia shall have the compensation fixed by section 853, *unless* (under section 3826) *that be more than is paid by private individuals for like services*. This construction reconciles the apparent conflict, and shows why section 3826 is not named with the other sections expressly excepted in section 853. This rule, I believe, has been often applied by courts in like cases, and in the instance before me gives due effect to both sections.

However, I regard the effect of section 3826 upon section 823 as entirely speculative for all publications of advertisements in newspapers since the act of March 3, 1875, above referred to. A provision for repeal as sweeping as that therein contained "has an effect [in appropriation acts] wholly regardless of the place or the general nature of the act in which it is found." (7 Opin., &c., 303; 14 *ibid.*, 681.) In my opinion it repeals section 3826 for every purpose connected with the claim before you.

Very respectfully, your obedient servant,
S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE INTERIOR.

Approved.

ALPHONSO TAFT.

Payment of Claims—Issue of Requisition.

PAYMENT OF CLAIMS—ISSUE OF REQUISITION.

It is the duty of the head of a Department, after facts have been submitted under section 191 Rev. Stat. which, in his judgment, affect the correctness of a balance certified to him upon settlement of a claim by the proper accounting officers of the Treasury, and after the certificate has been returned by the Comptroller with the decision in the case reaffirmed, to issue his requisition for payment of the balance certified.

Signing the requisition in such case under protest is without effect.

DEPARTMENT OF JUSTICE,
August 19, 1876.

SIR: Yours of the 16th instant, addressed to the Attorney-General, submits for his consideration the following questions occurring in various matters pending in your Department:

1. "Is the head of this Department absolutely obliged to make his requisitions to pay amounts awarded on claims settled, and certified by the proper accounting officers of the Treasury as payable from appropriations under his control, after facts which, in his judgment, affect the correctness of the claims and allowances have been submitted under section 191 Revised Statutes, and after the certificates have been received back from the Comptroller with the decisions in the cases reaffirmed?"

2. "If the Secretary of War is absolutely obliged to issue his requisitions in reaffirmed cases where he *conscientiously* believes that payments should not be made, would he be justified if he should signify in writing on the requisitions in such cases that his signature is given under protest?"

Section 191 of the Revised Statutes was originally enacted in 1868. It evidently refers to the opinion given to the Secretary of War by Mr. Attorney-General Stanbery, under date of September 15, 1866. By referring to that opinion, you will observe that the Secretary of War had there asked the Attorney-General very much the present question, and that the latter, following a long line of precedents in this Department, under Wirt, Taney, Berrien, Butler, Johnson, Crittenden, and Cushing, answered that the Secretary was not bound.

I think that the above act of 1868 meets that construction point blank, and *reverses* it for all cases thereafter.

I therefore answer your first question affirmatively.

Naval Courts-Martial.

2. In what I say upon the second question you will, of course, understand me as treating it merely in point of law.

It seems that the act of 1868 expressly discharges the official conscience of the Secretary of War from all interest in such affirmations by the Comptroller, and, therefore, that a protest is of no effect.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved.

ALPHONSO TAFT.

NAVAL COURTS-MARTIAL.

Civil engineers in the Navy are subject to the jurisdiction of naval courts-martial.

DEPARTMENT OF JUSTICE,

August 19, 1876.

SIR: Yours of the 14th instant, addressed to the Attorney-General, presents for his consideration the following question, arising, as I suppose, in the administration of your Department, viz:

"Whether civil engineers in the Navy are officers of the Navy subject to trial by court-martial for official misconduct."

I do not understand from this question that you desire an opinion whether civil engineers are *officers* in the Navy, but only whether they are amenable to naval courts-martial.

Civil engineers in the Navy are employés at navy-yards, acting under the direction of the commandant and Chief of the Bureau of Yards and Docks, and having charge of the erection and repairs of all buildings in the yards, and of all docks and wharves, and superintendence of all master and other workmen employed on said works. They are appointed at each navy-yard, where necessary, by the President, by and with the advice and consent of the Senate, and have such relative rank as the President may fix. (See Regulations for the Navy, ed. 1865, p. 162, &c., and Rev. Stat., secs. 1413 and 1478.)

Railroad Mail Transportation.

The class of persons over whom the jurisdiction of naval courts-martial extends may be collected from section 1624 of the Revised Statutes. In that section these are described indifferently as any person "in the naval service," or "in the Navy," or "belonging to the Navy."

I am of opinion that persons who have the official charge first above described, over buildings, docks, and wharves in navy-yards, come within the class last above mentioned as subject to the jurisdiction of naval courts-martial.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

THE SECRETARY OF THE NAVY.

Approved.

ALPHONSO TAFT.

RAILROAD MAIL TRANSPORTATION.

Case of the Baltimore Central Railroad Company, and also of the Delaware Branch Railroad Company, concerning mail transportation between Philadelphia and Chester by the former company and between Philadelphia and Wilmington by the latter company—service by each company performed over the track of the Philadelphia, Wilmington and Baltimore Railroad Company, over which this last-mentioned company at the same time transported the mail—held to be governed by the principles applied to the case of the Rockford, Rock Island, &c., Railroad Company, in the opinion of the Attorney-General of May 6, 1876.

DEPARTMENT OF JUSTICE,
November 23, 1876.

SIR: In reply to yours of the 7th ultimo, addressed to the Attorney-General, (consideration of which has been suspended until now at the request of counsel for the companies concerned therein,) I beg leave to say that the principles relied upon in the opinion of Attorney-General Pierrepont of May 6, 1876, in the case of the Rockford, Rock Island, &c., Railroad Company, referred to by you, control the questions now submitted.

The case before Mr. Pierrepont is varied in the present communication by the circumstance that the compensation

CITIZENSHIP.

for all the services over the *track common* to the postal routes has been adjusted and paid to the company which owns the track. I am of opinion that this variation is not material.

There is nothing to show that the Baltimore Central Railroad Company freely acquiesced in the payment made to the Philadelphia, Wilmington and Baltimore Railroad Company, or that anything else has occurred to prevent the former from now claiming the compensation otherwise due to it for having at the instance of the Post-Office Department transported mails between Philadelphia and Chester upon its own postal route. The same is true for the route between Philadelphia and Wilmington served by the Delaware Branch, &c.

As for future arrangements of routes 2408, 3401, and 3501, it seems that if the public is interested in having the service upon the common track performed by each of the companies as now, instead of being consolidated in the hands of only one of them, the designation of the routes upon the books of the Post-Office Department should be made to correspond with the fact. At present there is some discrepancy between the records and the action of the Department, whereas they ought always to agree.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The POSTMASTER-GENERAL.

Approved.

ALPHONSO TAFT.

CITIZENSHIP.

An alien woman married F., a naturalized citizen and resident of the United States, who died in 1860. In 1862 she married D'A., an alien, who was domiciled in the United States, but who subsequently died without becoming a citizen thereof. She claims, under section 2 of the act of March 3, 1871, chap. 116, compensation for her separate property taken during the lifetime of her second husband: *Held* that by virtue of the provision of the statute embodied in section 1994 Rev. Stat., the claimant upon her first marriage acquired a permanent status of citizenship, which could be lost only as in the case of other citizens; that this status was not affected by her subsequent marriage; and that she is a citizen of the United States within the meaning of section 2 of said act.

Citizenship.

DEPARTMENT OF JUSTICE,
January 23, 1877.

SIR: Yours of the 18th instant, addressed to the Attorney-General, presents for his opinion the following case:

"In the matter of the claim of Mary D'Ambrogia, of Warren County, Mississippi, now pending before the Commissioners of Claims, it appears in evidence that the claimant, an alien domiciled in the United States several years before the war of the rebellion, was married to one Franciola, a naturalized citizen and resident of the United States, (by whom she had three children, still living,) who died in 1860; that in 1862 she was married to one D'Ambrogia, an alien domiciled in the United States, (by whom she had one child, still living,) who died several years after the war, without becoming a citizen of the United States; that the claim of Mrs. D'Ambrogia is for property taken for the use of the Federal Army after her marriage with D'Ambrogia and during his lifetime, and she claims it as her separate property. This claim is presented under section 2 of the Army appropriation act of March 3, 1871; and, in view of the fact that the question of the status of this claimant as to citizenship affects the public Treasury, the Commissioners of Claims request that the Secretary of the Treasury will obtain and furnish them with the opinion of the Attorney-General of the United States upon the question whether Mrs. D'Ambrogia is to be regarded as one of those citizens whose claims are within the jurisdiction conferred by the section and act above cited."

The question presented above turns chiefly upon the meaning of section 1994 of the Revised Statutes, originally enacted in 1855, the provisions of which are as follows:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Upon consideration, I am of opinion that the citizenship bestowed in the above section is not lost by the woman's survival of her husband, but that it was the intention of Congress to bestow upon her a permanent status of citizenship, defeasible only as in the case of other persons.

Indian Territory—Fugitives in.

This being so, her subsequent marriage with an alien did not affect such condition. (3 Pet., 242.)

I conclude that the above-named claimant is a citizen of the United States within the meaning of the act of 1871, chap. 116, sec. 2, above mentioned.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

ALPHONSO TAFT.

INDIAN TERRITORY—FUGITIVES IN.

A military officer, unless he be an Indian agent, or be called upon to act by such agent, has no power to arrest fugitives from justice in a State who have escaped into the Indian Territory. Such persons may be removed from the Territory as intruders, and surrendered to the State authorities, by the proper Indian agent.

DEPARTMENT OF JUSTICE,

January 23, 1877.

SIR: Yours of the 11th instant, addressed to the Attorney-General, has been received and considered, and I submit thereto the following reply:

The Adjutant-General of Texas, as appears by inclosures in your communication, upon the 23d of October last, addressed to General Sheridan a note stating that certain fugitives from justice in Texas had escaped to that portion of the Indian Territory which is under the control of the commanding officer at Fort Sill, and requesting that such officer might be directed to arrest those persons when applied to by the sheriffs of Texas, and might guard them to the boundary, &c., so that they might be brought to justice.

I concur in the doubt expressed by General Sheridan as to the power of a military officer to act in the manner requested. It seems that unless the officer be himself an Indian agent, or be directed to act by some such agent, there is no such power.

Upon reference to various treaties with Indian tribes, it will be found that such fugitives are in general *intruders* within the territory spoken of, (7 Stats., 334, and 11 *ibid.*, 613,

Railroad Mail Transportation.

&c.,) and so may be removed by the proper Indian agent as being there contrary to law. (6 Opin. of Attorney-General, 302.)

No doubt, upon application by the civil authorities of Texas to the proper agent, &c., the fugitives in question will be surrendered to justice.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved.

ALPHONSO TAFT.

RAILROAD MAIL TRANSPORTATION.

Case of the Philadelphia, Wilmington and Baltimore Railroad Company, the Baltimore Central Railroad Company, and the Delaware Railroad Company, for mail transportation performed over the track of the first-named company, which was considered in opinion of November 23, 1876, reviewed upon additional facts furnished; and held that the periodical settlements heretofore made by the Philadelphia, Wilmington and Baltimore Company with the Post-Office Department, agreeably to an arrangement between the three companies, for the whole of such mail-service over the common track, from 1873 to 1876, ought to stand. The view of the Attorney-General, expressed in an opinion dated May 6, 1876, that there may be several post-office routes over the same railroad track, does not at all forbid that several railroad companies using the same track may so far be serving but one post-office route.

DEPARTMENT OF JUSTICE,

February 1, 1877.

SIR : The additional facts given in yours of the 1st of December, 1876, asking for a review of an opinion transmitted from this Department on the 23d of November, 1876, render it necessary that I should state the case more at length than was done before.

The Philadelphia, Wilmington and Baltimore Railroad Company owns the railroad track running from Philadelphia via Chester to Wilmington. From Philadelphia to Chester this track is also used by the Baltimore Central Railroad, which at that point diverges and uses its own track to Port Deposit. From Philadelphia to Wilmington

Railroad Mail Transportation.

the same track is also used (as is claimed) by the Delaware Railroad Company, which from the point last named uses a separate track to Delmar. Up to the 30th of June, 1876, (it is not material to come down later,) the *first* named company carried the great mail from Philadelphia, via Chester and Wilmington, to Baltimore; the *second*, a mail from Philadelphia, via Chester, to Port Deposit; and the *third*, a mail from Philadelphia, via Chester and Wilmington, to Delmar. The mails carried by the *first* and *second* companies were carried in their own cars; but that claimed to have been carried by the *third* company was in *fact* transported in cars owned by the *first* company—the *third* owning no rolling stock—its road being stocked and operated, under contract, by the *first* company.

Under an arrangement between the three companies the first made periodical settlements for the whole of such mail service *over the common track* with the Post-Office Department from 1873 down to 1876.

In this connection it will be borne in mind (1) that, under section 4000 of the Revised Statutes, the United States had a right to demand of the Philadelphia, Wilmington and Baltimore Company to transport mails upon all trains running over its road without extra charge, and (2) that for compensation for mail service by railroad companies certain rates are fixed by law (section 4002, 2d par.) which, beginning with \$50 for 200 pounds carried daily over the whole route, allows \$75 for 500 pounds, \$100 for 1,000 pounds, and so on, decreasing with increase of weight.

In settling with the Philadelphia, Wilmington and Baltimore Company, as above, the Post-Office Department *consolidated* the weight of all three mails, and paid at the rate corresponding thereto. Consequently the two other companies received for their respective services upon the common track a compensation much less than would have been due to them if dealt with severally.

The latter now apply to have this matter rectified, and for a rate of compensation based upon their several dealings, claiming that, according to the opinion of Attorney-General Pierrepont of May 6, 1876, the common track was really a several post-office route for each company.

Railroad Mail Transportation.

It now appears that the claimants were fully cognizant of the scope of the former settlements. For the purpose of this case, therefore, such settlements may be taken to have been made with them.

There is no suggestion by the claimants that new *facts* have been disclosed since those settlements were made.

It follows that, so far as they were made by your predecessor in office, they cannot now be disturbed. (See McGoon's case, 13 Opin., 456.)

Besides this, and so far as the matter may still be under your control, I am of opinion, for other reasons, that the settlements ought to stand.

In cases like the present it is not easy to distinguish between questions which are merely *administrative*, and so mere matters of discretion for the Postmaster-General, and questions which are purely legal, and therefore not within the scope of such discretion. Here, for instance, the Postmaster-General had power to require the service on the track common to the companies to be performed by the Philadelphia, Wilmington and Baltimore Company alone. If he had done so, that company, with the consent of the two others, might have used their trains for a part of such service, and this use, even if within the knowledge and under the superintendence of the Post-Office Department, would have created no *priority* as regards compensation between the Department and such other companies, and therefore no foundation for a *claim*. The manner in which the above settlements have been made intimates that the suggestion just made represents the case here. It is in this way that I reconcile the statement in your last communication (viz: "The Department has never recognized the service in carrying the mails between Chester and Philadelphia, in the case of the Baltimore Central, as a service performed by the said company, but as a service performed by the Philadelphia, Wilmington and Baltimore Company," &c.) with the circumstance shown by a record certified in this connection to the Attorney-General by the Postmaster-General on the 18th of November last, showing that it was in regular course of business known to the latter that in fact the Baltimore Central was performing the service now under consideration.

German-American Savings Bank.

Attorney-General Pierrepont's view, that there may be several post-office routes over the same railroad track, does not at all forbid that several railroad companies using the same track may so far be serving but one post-office route. The question is one of fact, to be decided according to the circumstances of each case; and where, as here, the Postmaster General states that but one party has been regarded by the Department as serving the route, such statement cannot in that connection be contradicted.

The claim of the Delaware Company is of course affected by some of the considerations above stated, more particularly in connection with that of the Baltimore Central, but it is subject to another objection peculiar to itself. It owns no rolling stock, and its road is both stocked and operated under contract by the Philadelphia, Wilmington and Baltimore Company. Therefore the mails claimed to have been carried by it between Philadelphia and Wilmington in fact were carried by the Philadelphia, Wilmington and Baltimore Company, on its own track and in its own cars. It is not material that such particular cars were run by the Philadelphia, Wilmington and Baltimore Company, merely because of a contract with the Delaware Company. The provisions of section 4000 of the revisal apply.

Upon the whole, it seems that the claims under consideration should not be allowed.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The POSTMASTER-GENERAL.

Approved.

ALPHONSO TAFT.

GERMAN-AMERICAN SAVINGS BANK.

The German-American Savings Bank of Washington, D. C., incorporated under a law of Congress relating to the District of Columbia, and having a capital of \$126,000, is, by virtue of section 6 of the act of June 30, 1876, chap. 156, required to keep on hand (under section 5191 Rev. Stat.) a reserve of 25 per cent. of its deposits, and is entitled (under sections 5157-5189 Rev. Stat.) to receive circulating notes.

German-American Savings Bank.

DEPARTMENT OF JUSTICE,
February 5, 1877.

SIR: Yours of the 21st of October last, addressed to the Attorney-General, having first been referred for examination to a gentleman whose prior engagements have prevented him hitherto from giving it consideration, was, upon the 1st instant, transferred to me, and herewith I submit a reply.

You state that under the sixth section of the act of the 30th of June last (1876, chap. 156) the two following questions have arisen in your Department in relation to the German-American Savings Bank of this city, which has a capital of \$126,200, and is incorporated under legislation by Congress to be found on page 201 of the volume of the Revised Statutes "relating to the District of Columbia."

1. Is such bank required under section 5191 of the Revised Statutes to keep on hand a reserve of 25 per cent. of its deposits?

2. Is it entitled under sections 5157-5189 of the Revised Statutes to receive circulating notes?

The sixth section of the act of June 30, 1876, above mentioned, so far as it relates to this matter, is:

"And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: *Provided*, That such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars."

Banks having a capital upon which dividends are paid, and at the same time doing a savings business, are not, as is well known, exclusively "savings banks." Therefore, if a business exclusively *savings* be incompatible with existence as a national bank, legislation which includes to some extent within its operation savings banks having capital may include them to every extent except so far as may obstruct the *savings* feature in their constitution; and if such legislation extend to such

German-American Savings Bank.

banks expressly to all purposes, *so far as the same may be applicable to such savings banks*, it does include all their operations except those especially savings.

I conclude therefore that the expression, *so far as may be applicable to such savings banks*, in the body of the section under consideration, does not prevent the application to them of provisions in the acts referred to which are consistent with so much of their business as is not a *savings* business, although inapplicable to so much thereof as is.

The question remains whether the other words of the section above quoted show that Congress intended that the general provisions of the national banking act should include the savings banks therein mentioned.

In this connection the proviso to the section seems to be significant, viz: "*Provided*, That such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars." For the only connection in which occurs a provision as to the amount of capital required of associations under the national bank act is that which specifies what amount is required before such associations *can become national banks*. (See Rev. Stat., secs. 5138, 5140.) I therefore conclude that inasmuch as by the ordinary rules of interpretation the above proviso relieves the savings banks of Washington of a burden *imposed by the section* to which it is attached, such section by itself is to be taken as requiring these banks to become national banks in the ordinary way, *i. e.*, by subscribing and paying up a capital of \$200,000, the effect thereupon of the proviso being that those now established may become national banks with only \$100,000 of paid-in capital.

Now, upon referring to the body of the section, is it difficult to find the words which have that effect? It enacts that *all savings banks in the District of Columbia, organized under any act of Congress, which shall have a capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, &c., applicable to national banking associations*. This predicate, especially in the light of the *proviso* above referred to, is equivalent to that in section 5154 of the revision under which State banks become national banks, viz: *shall have the same powers and privileges, and shall be subject to the*

Extra Compensation.

same duties, responsibilities, and rules as are prescribed for national banking associations. In section 5154 these words are modified by the phrase *in all respects*, whilst those taken from the act of 1876 are followed, as already said, by the words *so far as the same may be applicable to such savings banks.* I have above expressed my opinion as to the extent of this latter modification, and only add that, as *expressio unius est exclusio alterius*, this clause and the *proviso* contain the only modifications to which in this connection the provisions of the act referred to in the section are liable.

Taking this view of the act of 1876, I conclude that both of the questions above submitted should be answered in the affirmative.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

ALPHONSO TAFT.

EXTRA COMPENSATION.

The act of 1842, chap. 183, (section 1785, Rev. Stats.,) does not prohibit the minister resident at the Hawaiian Islands, who is allowed an annual salary, from receiving in addition thereto extra compensation for his services in supervising and taking testimony to be used in the Court of Commissioners of Alabama Claims, under the provisions of sections 4 and 11 of the act establishing that court.

Where the service is one required by law, but not of any particular official, and compensation therefor is fixed by competent authority and is appropriated, an officer who under due authorization performs the service is entitled to the compensation.

DEPARTMENT OF JUSTICE,

February 7, 1877.

SIR: In yours of the 3d instant, addressed to the Attorney-General, is stated a question whether Mr. Pierce, who is minister resident of the United States to the Hawaiian Islands, at a salary of \$7,500 per annum, is entitled to receive in addition thereto the allowance usually made to assistant counsel for

Extra Compensation.

supervising and taking testimony to be used in the Court of Commissioners of Alabama Claims, such supervision, &c., having taken place whilst Mr. Pierce was such minister, and at the instance of Mr. Cresswell, the general counsel for the United States before the commission.

The act establishing the court above mentioned *authorized* (section 4) *its necessary incidental expenses* (of which this was certainly one) and (section 11) made a corresponding *appropriation* therefor.

I am, therefore, to inquire how far the act of 1842, chap. 183, (Rev. Stat., sec. 1785), applies to prohibit Mr. Pierce's claim for *extra pay*.

The Supreme Court, in the case of *Converse vs. The United States*, (21 How., 463,) held that the above statute does not apply to a case in which one public officer, at the instance of another, duly empowered, has performed services authorized by law, but not belonging either to the office of the party performing it, or to that of any other specified official, compensation for which has also been explicitly *appropriated*. The appropriation in that case was not a specific appropriation to the officer, or to the class of officers to which he belonged, but a general appropriation, to compensate the service in question, without reference to the person or class of persons performing.

The case is elaborately argued by the court, and the opinion of Justice Curtis *below*, which is overruled thereby, and is to the effect that the circumstances above named do not prevent the application of the act of 1842, is adopted as that of three justices in the Supreme Court who dissent. The view of the law taken by the court has not since been changed. (See 7 Wall., 338; 8 Wall., 33.)

Inasmuch as the above decision was made at December term, 1858, and Congress has not since modified the statute therein interpreted, the rule of action in such cases may be thus stated. Where the service in question is one required by law, but not of any particular official, and compensation therefor is fixed by competent authority, and is appropriated, the officer who under due authorization performs the service is entitled to the compensation.

The cause presented by you comes within this category,

Mail Transportation by Union Pacific R. R. Company.

and, therefore, I am of opinion that Mr. Pierce is entitled to the usual compensation given in such cases to assistant counsel.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF STATE.

Approved.

ALPHONSO TAFT.

MAIL TRANSPORTATION BY UNION PACIFIC R. R. COMPANY.

Inquiry being made whether the Union Pacific Railroad Company should be paid the compensation for mail transportation fixed by Congress for railroads generally, or should be paid as compensation therefor what is paid by private parties for service of a similar kind, and also whether that company is subject to the reduction of compensation provided in the act of July 12, 1876, chap. 179: Advised that (until a final and authoritative judicial determination of the questions raised) the Postmaster-General apply the same rules in dealing with that company which Congress has made applicable to railroad companies in general.

Section 6 of the act of July 1, 1862, chap. 120, leaves the United States free, as against the Union Pacific Company, to resort to either the general rights which they have against all railroad companies or the special rights therein provided.

DEPARTMENT OF JUSTICE,
February 16, 1877.

SIR: Yours of the 27th ultimo, addressed to the Attorney-General, is as follows:

"The Union Pacific Railroad Company have always been paid for the transportation of the mails over their road under the provisions of the different acts of Congress fixing the rates to be paid to all railroads for the transportation of the mails, which compensation has always been received and accepted by the Union Pacific Company without protest until the 1st of September, 1876, when the Department was notified that from the 1st of February, 1877, it would be charged by the company the same rates as private parties for the transportation of express matter."

"The company claims that it has the right to so charge under the provisions of the 6th section of the act of July 1. (12 Stat., 493.)"

Mail Transportation by Union Pacific R. R. Company.

"I desire to be advised by you whether the Union Pacific Railroad Company, under the sixth section of the act of 1862, above referred to, should be paid the compensation for the transportation of the mails fixed by Congress to be paid to all railroads without exception, or whether it should be paid as compensation the amount paid by private parties for the alleged same kind of service."

"The decision of this question will necessarily embrace the decision of another, to wit: Whether the said company is subject to the reduction of compensation as provided in the act of July 12, 1876. (Pamphlet copy, p. 78.)"

"I inclose copies of correspondence between the Department and the counsel and officers of the said road relative to this claim, in which will be found the account of the company against the United States."

I have considered the important question above presented, and in the same connection have read the correspondence inclosed by you.

The sixth section of the act of 1862, chap. 120, above cited, is as follows:

"That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the Government, whenever required to do so by any Department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (*at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;*) and all compensation for services rendered for the Goverment shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

The grants spoken of in this section are gifts of an immense amount of public lands and a loan for thirty years of the national credit to the extent of nearly thirty millions of dollars. That which is therein stipulated for as to be done by the company in return for these grants must of course be something of *special benefit* to the United States, *i. e.*, some-

Mail Transportation by Union Pacific R. R. Company.

thing *favorably to distinguish* the rights of the United States as against the Union Pacific Railroad Company from their ordinary rights against railroad companies to which they have done no favors. Therefore it seems that to cite the above stipulation as showing that the United States have less rights in regard to any of the matters therein mentioned against the Union Pacific Railroad Company than against railroad companies in general is, however ingeniously argued, a complete turning upside down of the purpose of the parties.

In my opinion the above section leaves the United States free as against the Union Pacific Company to resort to either the general rights which they have against all railroad companies, or the special rights therein provided.

Taking this general short view of the case, I need not detain you by elaborating another point which arises from a consideration of the section, and which is to the same general effect, viz: that if the United States can be held to the bare words of the particular passage without regarding the context or the relations of the parties *aliunde*, it appears that the service for which the United States are to pay the rates now claimed is that of a "preference," in times of exigency, and not that of a bare *participation* with the traveling public in ordinary times, as the case is here. Under so narrow a rule of interpretation it might be made out that the United States agreed to pay such rates for a *monopoly* of transportation upon this road whenever war or other public necessity demanded it, but the rule for times of peace and average use would have to be sought elsewhere.

Therefore, until the court shall have made an authoritative settlement of the questions raised by the Union Pacific Company, I advise that you apply to your official dealings with them the same rules which Congress has made applicable to railroad companies in general. This advice covers both inquiries submitted by you.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The POSTMASTER-GENERAL.

Approved.

ALPHONSO TAFT.

Lease of "The Arcade" in Chicago.

LEASE OF "THE ARCADE" IN CHICAGO.

A building in Chicago, known as "The Arcade," was leased to the United States, "to have and to hold, &c., from the 3d day of May, 1874, for and during the term of three years thence next ensuing." The lease contained a clause providing that the lessor might use such part of the building as was not needed by the lessee, "in accordance with the terms of acceptance of said building by the Hon. Secretary of the Treasury, as shown by copy of his letter, attached hereto, and made part of this agreement." This letter, after referring to a proposition made in behalf of the owner of the premises to lease so much of the same as may be needed by the Government "until the public building to be erected in Chicago is ready for use," states under what circumstances the owner would be permitted to occupy a part of the premises, and "upon these conditions" the Secretary concludes to take the building: *Held that the term of the leasehold is governed (not by the letter of acceptance, in which case it might endure beyond three years, but) by the provision in the lease above quoted, which definitely limits its duration to three years from the 3d of May, 1874,*

DEPARTMENT OF JUSTICE,

February 21, 1877.

SIR: Yours of the 19th instant, addressed to the Attorney-General, presents a question as to the time during which runs the lease of "The Arcade," a building in Chicago occupied by the United States.

The lease is in writing and its operative words are as follows, viz:

"Said party of the first part, [John V. Farwell, of Chicago,] for and in consideration, &c., does hereby lease unto said party of the second part, [the United States,] the following described building, &c., known as 'The Arcade,' &c., *to have and to hold, &c., from the 3d day of May, 1874, for and during the term of three years thence next ensuing, &c., &c.* And it is further understood, &c., that such part of the building as may not be needed for Government use can be used by the party of the first part *in accordance [with] the terms of acceptance of said building by the Hon. Secretary of the Treasury, as shown by copy of his letter attached hereto, and made part of this agreement, &c., &c.* And it is hereby also understood that the said party of the second part shall have the privilege of vacating the premises, &c., at any time prior to the expiration of the period to which it is limited, viz, May 3, 1877, in the

Lease of "The Arcade" in Chicago.

event of the completion of the new custom-house building at Chicago at an earlier date," &c.

The letter of the Secretary of the Treasury, mentioned in the lease, (addressed to Mr. Farwell, above named,) is dated January 29, 1872, and, so far as relevant, is as follows :

"Hon. C. B. Farwell has proposed to lease your building, known as 'The Arcade,' at the rate of \$25,000 a year, until the public building to be erected in Chicago is ready for use. His proposition gives to the Government the use of so much of the building as may be needed for public purposes; the same to be finished and arranged in a manner acceptable to this Department. It is understood, however, that if the upper portion of the building should not be needed for the purposes of the Government, and a way to it can be constructed without passing through the main building, and the use of it by you will not interfere with the public business, or endanger the public property, you are to occupy such portion. Upon these conditions I have concluded to take your building," &c.

I understand that "The Arcade" was first taken by the United States in 1872 for a term of two years, which ended immediately before the commencement of the lease now existing. This circumstance is not material, but is mentioned here to explain the apparently long interval between the acceptance and the lease.

If the lease before me had expressed no time during which the term should last, and contented itself by referring for that incident, as for others, to the letter of the Secretary of the Treasury, inasmuch as the "public building" mentioned in that letter will not be "ready for use" for some time after the 1st of May, the term would have run for more than three years; and, upon the contrary, if there had been no reference to the letter, the term would certainly have been for three years only.

It is contended by the lessor that in the above matter the letter of acceptance controls the lease, and therefore that the term is in effect one *until the public building, &c., is ready for use.*

Upon consideration, it seems that this is not so.

If the letter had been actually inserted in the lease, a due respect to the action of the parties in previously specifying

Lease of "The Arcade" in Chicago.

therein *three years* as the time for which the lease would run would prevent such insertion from having more effect than to modify such previous termination by the event of a *previous* completion of the "public building." Such modification would allow that the parties *meant something* by inserting the words pointing to a termination upon the 3d of May, 1877, as well as by the words used in the letter; whereas a suggestion that the completion of the "public building" was, in any event, *i. e.*, whether it occurred before or after such 3d day of May, 1877, to be the only conclusion of the term, *entirely nullifies* the language *previously* used and also *subsequently* alluded to. This, unless unavoidable, is not allowed in construing writings that convey the intentions of parties. Every significant word therein should have some meaning ascribed to it.

It seems that the parties must have understood this, and that *upon the face of the lease* the letter is introduced to modify only that clause in which it is mentioned. We have seen that if the letter is applied to every part of the lease, the rules of interpretation will not allow its words to annul those of the latter, as contended for. It also appears that because of a subsequent clause in the lease, the letter, if applied in the way that general rules of interpretation allow, has no real effect upon the point under consideration. By such clause the term is already contingent upon a completion of the "public building" *prior* to May 3d, 1877. It can be no more if the letter be applicable to every clause. In my opinion, however, it is applicable only to the clause which refers to it, and, therefore, only so much of the letter as is pertinent to that clause is made effective by the reference.

The parties have not agreed upon a lease except for three years. If Mr. Farwell were the party now unwilling to the *extension*, (so to say,) the Government could not compel him thereto. The case is of course the same *vice versa*.

Yours, very respectfully,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

ALPHONSO TAFT.

Contract for Mail-Carriage.

CONTRACT FOR MAIL-CARRIAGE.

Proposals for carrying the mail on route No. 43132 were made by G. and accepted, but were subsequently suspended, and contract was made with O. for the full term. Suit against the United States was brought by G. in the Court of Claims, claiming damages for breach of contract, which resulted in a judgment in his favor. Thereupon G. filed an application in the Post Office Department that he be permitted to perform the service on said route according to his proposal for the balance of the contract term: *Advised* that, the rights of G. under his proposal having been ascertained by the judgment recovered, he has no legal right to the service; but that, as the contract with O. for the full contract term was irregular and unfounded in law, there is no legal objection to terminating the service with the latter, and accepting a contract with the former in accordance with his application, should the Postmaster-General be of opinion that the public interests will be served thereby.

DEPARTMENT OF JUSTICE.

February 22, 1877.

SIR: Yours of the 25th ultimo, addressed to the Attorney-General, states the following case and question:

"Selucius Garfield, esq., made proposals to this Department, under the advertisement of the Postmaster-General of October 1, 1873, for carrying the mails from Port Townsend to Sitka, on route No. 43132.

"The proposal of Mr. Garfield was accepted by the Postmaster-General, but was subsequently suspended, and contract entered into with Mr. George K. Otis, who is now performing the service under it. Mr. Garfield, feeling himself aggrieved by the action of the Postmaster-General, brought suit in the Court of Claims against the United States to recover in damages the loss he had sustained by the action of the Postmaster-General.

"Although the Court of Claims found that Mr. Garfield had suffered large losses, they rendered judgment against him. From this judgment Mr. Garfield appealed to the Supreme Court of the United States, which reversed the judgment of the Court of Claims, and directed the judgment that should be rendered by it.

"After this judgment of reversal, Mr. Garfield filed an application with the Postmaster-General, that he might now be permitted to execute the contract and perform the service

Contract for Mail-Carriage.

on said route No. 43132, according to his proposal, for the balance of the contract term; that, is from the present time to the 30th of June, 1878.

"I desire to be advised whether under the facts here briefly, but more fully stated in the accompanying papers, I have the authority to annul the existing contract with Mr. Otis, and now enter into contract with Mr. Garfield for the performance of the service on route No. 43132, from Port Townsend to Sitka, according to his proposal."

After Mr. Garfield obtained judgment for the amount which the Supreme Court considered to be the measure of his damages upon the breach of the contract by the United States, there remained no further claim for him thereupon. His rights of every description under the contract had been ascertained by the judgment: *transierunt in rem judicatam.*

As a consequence of the above decision by the Supreme Court, it follows that the provisions of law have not been observed in accepting the bid of Otis. As Garfield was entitled to the route, Otis was not. Under the circumstances, of miscarriage, &c., the Postmaster-General might, under section 3943 of the Revised Statutes, have made a provisional contract with Otis or another to execute the service for a time less than four years, and pending such service have made a new advertisement. This was not done; but a contract for full four years was awarded to Otis upon the original bidding—very naturally, too, considering the advice which had been given. Since then, however, as is said above, the decision of the Supreme Court shows that what was done was irregular and in law unfounded.

If, therefore, the Postmaster-General shall be of opinion that public interests will be served thereby, I see no legal objection to his terminating the service by Otis, and in lieu thereof accepting a contract from Garfield, in accordance with the terms of his former bid, for the remainder of the period covered by his former contract.

Unfortunately there has in this connection been miscarriage greatly to the prejudice of Garfield, he being in no way blamable. I do not perceive that any one, indeed, is blamable therefor. In pursuing what he supposed to be his right, under the condition of the *proposals* made by the United

International Penitentiary Congress.

States, Mr. Otis, in protesting, &c., has been active in bringing about such miscarriage. He cannot complain if the matter is now rectified as nearly as may be.

You will not understand me as admitting here that Mr. Garfield has any *legal* right to further redress than that which has been given him by the Supreme Court. As far as I am advised, I understand that neither he nor Otis has any legal right to the service in question. Upon the score of equitable dealing, however, Mr. Garfield has claims to consideration. But these depend upon his releasing, in the first place, all right to the damages awarded as above by the Supreme Court.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The POSTMASTER-GENERAL.

Approved.

ALPHONSO TAFT.
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INTERNATIONAL PENITENTIARY CONGRESS.

The President has power to authorize the commissioner, appointed under the joint resolution of February 16, 1875, to represent the Government at the International Penitentiary Congress to be held at Stockholm.

DEPARTMENT OF JUSTICE,

March 31, 1877.

SIR: Yours of the 27th instant, addressed to the Attorney-General, is as follows:

"A joint resolution, approved February 16, 1875, authorized the President to appoint a commissioner to attend the International Penitentiary Congress proposed to be held next year at Rome. (18 Stat., 524.)

"The sundry civil bill of March 3, 1875, (18 Stat., 390,) appropriated eight thousand dollars to pay the expenses of the commissioner appointed by the President under the above resolution. The appropriation being to attend the International Penitentiary Congress to be held the next year at Rome, Mr. E. C. Wines was commissioned on February 22,

International Penitentiary Congress.

1875, as commissioner to the International Penitentiary Congress to be held at Rome.

"In the month of August, 1875, Mr. Wines addressed the President from Burchsal, Grand Duchy of Baden, sending what he called a preliminary report. In this he states that the question, whether any congress should be held until the year 1876, was raised before the committee which was charged with such duty, and that upon a vote being taken it was decided by a vote of eight against six that no congress should be held until the year 1877.

"It would appear, therefore, that the idea of a prison congress to be held at Rome was simply an expectation, and that the committee decided that there should be no such congress.

"At the close of this report Mr. Wines states that he was authorized to suggest to the Government of Sweden to extend an invitation to the congress to meet there in the year 1877, and from a dispatch of Mr. Andrews it would appear that a congress is to be held in the year 1877 at Stockholm.

"The sundry civil bill, approved March 3, 1877, provides, on page 20, that six thousand dollars, or as much as necessary, of the sum appropriated by the act of March 3, 1875, above referred to, to pay the expenses of the commissioner appointed by the President under the joint resolution of February 16, 1875, is reappropriated and made immediately available for the payment of the preliminary expenses of said commission.

"As Mr. Wines proposes to proceed to Europe for the purpose of attending the International Prison Congress to be held, as has already been stated, at Stockholm, the question arises whether the President has any power to authorize him to represent the Government at the said congress; and I have consequently to request that I may be favored with an expression of your opinion upon the subject."

I understand that there is but one body known as the International Penitentiary Congress, and that it is composed of members commissioned by governments of different nations, and meeting at various times and places fixed upon by itself. On and before the 16th day of February, 1875, it was proposed to hold its next meeting in the year 1876 at Rome. The two acts of Congress, first above referred to by you, therefore

International Penitentiary Congress.

give a description of the congress to which the commissioner was to be sent that would remain applicable whether in the event it should or should not meet at the time and place proposed. I apprehend that after the acts had been passed the congress might have changed its time and place of meeting without affecting the applicability of the commission and appropriation. Wherever and whenever (within reasonable limits) it did actually meet, it was still the same body that in February and March was "proposed to be held the next year at Rome."

The above suggestions are exclusive of considerations arising under the law of the Treasury, which requires appropriations to be covered thereinto at the end of two years. If those suggestions be correct, the recent sundry civil act cited by you renders it unnecessary to consider that the appropriation by the act of March 3, 1875, is no longer available.

I submit, further, that the above sundry civil act (which I take as referred to in your communication) is a legislative construction that the acts first named applied to a contemplated International Penitentiary Congress, the time and place of whose meeting, although certainly *then* (1875) specifically proposed to be *in 1876 at Rome*, were not, as so proposed, matter of substance; and, therefore, as such congress had not at the time of the passage of such sundry civil act yet convened, (although still contemplated,) it continued to be provided for by the previous legislation, the above law of the Treasury requiring, however, a reappropriation, and the legislature taking that occasion both to reduce the amount given and to authorize *preliminary expenses*.

I am therefore of opinion that the President has power to authorize Mr. Wines to represent the Government at the International Penitentiary Congress, to be held, under the circumstances above stated, at Stockholm.

With great respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF STATE.

Approved.

CHAS. DEVENS.

Western and Atlantic Railroad of Georgia.

WESTERN AND ATLANTIC RAILROAD OF GEORGIA.

The provisions of the act of March 3, 1877, chap. 119, by which the Secretary of War is "authorized to reopen the settlement made by the United States Government with the Western and Atlantic Railroad of the State of Georgia," &c., are mandatory. The word "authorized," as there used, confers a power, the exercise of which is not meant to be dependent upon the discretion of the Secretary, but to be imperative upon him when he is applied to by the party interested.

DEPARTMENT OF JUSTICE,

April 13, 1877.

SIR: Yours of the 4th instant, addressed to the Attorney-General, calls his attention to an act of Congress, (given below,) passed on the 3d of March last, and asks (1) whether such act be *mandatory* in all its provisions, and (2) if not thus mandatory, what is the nature and extent of the *discretion* thereby conferred?

The act is as follows:

AN ACT to authorize the Secretary of War to open and readjust the settlement made by the United States Government with the Western and Atlantic Railroad of Georgia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War is hereby authorized to reopen the settlement made by the United States Government with the Western and Atlantic Railroad of the State of Georgia, and to adjust the same upon the basis and the plan of settlement which was adopted in the settlement made by the Secretary of War with the Nashville and Chattanooga Railroad Company, the East Tennessee and Georgia Railroad Company, and the Nashville and Decatur Railroad Company, under the authority of the act of Congress approved March 3, 1871.

SEC. 2. That when said claims have been adjusted in pursuance of the provisions of this act, the Secretary of War be, and he is hereby, authorized to issue his warrant on the Treasury of the United States to the governor of Georgia, or his order, for the amount of money it is found ought to be refunded to said railroad on account of said settlement.

Approved March 3, 1877.

Western and Atlantic Railroad of Georgia.

This is, therefore, one of a rather numerous class of cases, in which a question arises whether in statutes words importing a grant of authority or power to a public officer to do a certain act renders such action in any case imperative. Such words are "shall be lawful," "may," "empowered," "authorized," and the like.

A rule for such cases has recently been laid down as follows by the Supreme Court of the United States in the case of *Supervisors vs. The United States*, 4 Wall., 435.

"The conclusion to be deduced from the authorities is, that where power is given to public officers in the language of the act before us, or in equivalent language—whenever the public interests or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done." * * *

"In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'"

That was a case in which, a certain county being in debt to a bank, an act was passed providing that the supervisors of counties "may, if deemed advisable," levy a tax to liquidate their debts. The words quoted were held to import a *command* to levy the tax.

The rationale of the judgment is that its already existing relation of *creditor* gave to the bank a right to demand of the county authorities the execution of all their *powers* to make satisfaction; and concluded them as to its *advisability*. (See also *Galena vs. Amy*, 5 Wall., 705.)

In the present case, the railroad company is not now a creditor of the United States. There has already been a settlement of its accounts. A question arises whether its relations are such as to warrant an application of the above rule.

The papers show that the company claims that the United States are its debtors because of an alleged overcharge for rolling stock, &c., sold to it in the year 1865. The original foundation or justice of such claim is of no consequence in the present investigation. Such foundation or justice is not questioned by me, but it is laid out of the case as one that has been passed upon by Congress. The only question here is,

Western and Atlantic Railroad of Georgia.

whether a claim, *bona fide* urged, and treated by Congress as deserving consideration and as coming within a certain rule of administration referred to in the statute, constitutes such a special relation as to entitle the claimant to insist that a statute *authorizing* a readjustment thereof is imperative upon the officer so authorized.

I have in this connection considered the leading modern English case, *Macdougall vs. Paterson*, 11 C. B., 755, and several other English and American cases, together with three opinions heretofore officially given by Attorney-General Cushing. (8 Opin., 39, 41, 546.)

From these uniform decisions of the courts I gather that the word "authorize," in such connection, confers "jurisdiction," not "discretion"; that the Secretary of War has jurisdiction to open the settlement, to readjust the accounts upon a certain basis or rule of administration prescribed in the statute, and to draw a warrant for any amount found thereupon to be due; but that, when applied to by the party interested, it is not for him to say whether the settlement shall be reopened or whether he will apply the rule of action prescribed, any more than whether, upon making a favorable decision, he will draw a warrant upon the Treasury.

In *Macdougall vs. Paterson*, (cited above,) Jervis, C. J., said: "Critically speaking, the word 'may' is correctly used to describe the sort of authority which a judge has in such cases. He is not bound to act against the plaintiff's wish; but, the fact being established which gives the authority, he may, at the plaintiff's request, make the orders. * * *

"The general authorities on the subject appear fully to warrant the construction which we have thought ourselves called upon to put on the statute. An early case was cited by Mr. Baddeley—Alderman Backwell's case. One of the questions there raised before Lord Keeper North was, whether a commission of bankruptcy could be denied by the lord chancellor, or whether it was *de jure*; and the lord keeper said: 'I hold that the commission is *de jure*, and the statute which saith that the chancellor *may* grant, &c., is as if it had been "shall grant" or "ought to grant," but he cannot grant *ex officio* but on request of persons interested.' And he added that it had been so resolved by all the judges. This case

Western and Atlantic Railroad of Georgia.

(2 Chan. Cas., 191) has been followed by others, * * * which we think support the rule, that, when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application.

"For these reasons we are of opinion that the word 'may' is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises."

In the present instance Congress has already decided that a case for the jurisdiction in question has arisen. There is, therefore, here no precedent "fact" to be established. By the statute, the case, whatever it be, preferred by the Western and Atlantic Railroad Company against the United States, confers the jurisdiction. The statute thereupon proceeds to set forth a definite rule of administration and a method of giving *satisfaction*. These instructions being observed, Congress has assumed all responsibility for opening the settlement, and also for laying down the rule for readjustment.

In regard to Mr. Cushing's opinions above cited, given in the year 1856, I have to say: (1) That in the first the question was, whether Congress, in *authorizing* the Postmaster-General to pay a certain sum of money to a mail contractor for the remainder of a term then running, intended to *command* such payment; the opinion that it did not so intend rests in great degree upon a context in the same act quoted by him; (2) that in the second case, neither the public nor any third person was interested in the question in the manner required by the rule; and (3) that in the third case (growing out of an act of Congress which provided "that the corporation of Georgetown shall have *full power* and authority to lay, &c., a school tax,") it seems to have been thought that neither private nor public interests were affected in the sense required by the rule, whilst it may be that the color given therein to the general discussion of the rule in question might have been modified had it *followed*, instead of *preceding*, the recent decisions of the Supreme Court.

Western and Atlantic Railroad of Georgia.

To conclude, I answer the former of the questions asked by you in the affirmative, and this, of course, leaves nothing to be said as to the latter.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved.

CHAS. DEVENS.

WESTERN AND ATLANTIC RAILROAD OF GEORGIA.

The proceedings in Congress on the bill concerning the settlement made with the Western and Atlantic Railroad of Georgia are not admissible to control the words finally adopted by that body to convey its meaning in the act relating to the same matter (act of March 3, 1877, chap. 119.)

DEPARTMENT OF JUSTICE,

April 24, 1877.

SIR: In reply to yours of the 21st instant, addressed to the Attorney-General, and inclosing a note from the Quartermaster-General to yourself in reference to the opinion given by the Attorney-General upon the construction of an act of Congress authorizing you to reopen a settlement heretofore made with the Western and Atlantic Railroad Company of Georgia, allow me to say that in point of fact, when the matter was under consideration, attention was called by Senator Gordon to the report inclosed by you, and specifically to the circumstance that the act as originally introduced "authorized and required" the Secretary to reopen such settlement, and that in committee the phraseology was altered to "authorized" only. He did so in order to call attention further to what passed orally in committee at such time; believing, as he said, that the transaction, taken altogether, favored his suggestion as to the meaning of the words—showing what was the *actual* intention of Congress, as, in his view, did also certain matters which he mentioned as having occurred in the Senate in debate.

However, in construing the act, no weight was attributed to any of these circumstances. It seems clear that "*the act itself* speaks the will of Congress, and this is to be ascertained from the language used." (91 U. S. Rep., p. 79.) The supreme

Claims for Army Transportation.

court of Pennsylvania has said that *it is delusive and dangerous to admit messages of governors, journals of the legislature, or reports of committees to aid in construing statutes.* (7 Harris, 156; See Sedgwick, Construction, &c., 203.)

It seemed therefore, and still seems, that the proceedings in Congress are not admissible to control the words finally adopted by that body to convey its meaning. The word *required* may have been stricken out because superfluous, and if superfluous, then discourteous to the officer addressed, as was said here to have been the fact. I mention this merely to show how "delusive" it is to go into such matters, without giving any positive weight to the explanation thus suggested.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved.

CHAS. DEVENS.

CLAIMS FOR ARMY TRANSPORTATION.

The act of March 3, 1877, chap. 106, made an appropriation in these terms: "For payment of amounts certified to be due by the accounting officers of the Treasury Department for transportation of the Army, being for the service of the fiscal year 1871 and prior years," &c. Among the "amounts certified" was an amount found due on settlement of a claim of the State of Kentucky "for the use and occupation by the Army of the United States of the slackwater navigation of the Green and Big Barren Rivers from November 1, 1861, to June 30, 1865:" Held (1) that the claim of the State is within said appropriation; (2) that it is not transmissible to the Court of Claims under section 1063 Rev. Stat.; (3) that the Secretary of War, to whom the amount was certified, is bound under section 191 Rev. Stat. to issue his requisition for payment thereof, without regard to his own view of the merits, unless there be "any facts" which in his judgment affect the correctness of the balance; in this case he is authorized, before signing the requisition, to submit the facts to the Comptroller; (4) upon such submission, the decision of the Comptroller is "final and conclusive."

DEPARTMENT OF JUSTICE,
May 5, 1877.

SIR: Yours of the 26th, addressed to the Attorney-General, states, for his opinion, in effect, the following case and question:

Claims for Army Transportation.

Upon the 24th of January, 1876, your predecessor approved of a claim, then pending before him, for \$101,121.05, on behalf of the State of Kentucky, "for the use and occupation by the Army of the United States of the slackwater navigation of the Green and Big Barren Rivers, &c., from November 1, 1861, to June 30, 1865," during the rebellion. This, having theretofore been referred to the Third Auditor for action, was afterwards in due course of office also approved by the Second Comptroller. In March, 1876, the Secretary of the Treasury submitted the claim so approved to Congress as one of the items for which he then asked an appropriation to supply deficiencies, but no appropriation therefor was then made. In January, 1877, he transmitted to the House of Representatives a statement of balances of appropriations carried to the surplus fund under act of June 20, 1874, and asked for their reappropriation for, among other items, the following: "For payment of amounts certified to be due by the accounting officers of the Treasury Department for transportation of the Army, being for the service of the fiscal year 1871 and prior years, per act of July 15, 1870, \$181,828.22." Such appropriation was thereupon made by an act of March 3, 1877, using the very words above quoted. It appears that among the amounts "certified" as above was the above claim by the State of Kentucky.

Thereupon, after calling attention to a difference of opinion amongst gentlemen in your Department as to the duty of the Secretary under the circumstances above stated, you ask "whether, upon this record, the Secretary of War is at liberty to investigate and decide this claim upon its merits, or must issue the requisition for its payment, without regard to its merits."

This question brings up again for consideration the much-canvassed section 191 of the Revised Statutes. The criticism upon that section because of its conferring upon officers, in other respects subordinate, a *quasi* despotism in matters of account over heads of Departments, seems made in inadvertence of the fact that like provisions are customary in governments of checks and balances. I need not discuss or illustrate this, inasmuch as for the present it may be enough to know that *ita lex, &c., &c.*; although at the same time it is satis-

CLAIMS FOR ARMY TRANSPORTATION.

factory to feel assured that the *check* is according to "the reason of the thing in free governments."

As regards the condition, by the above statement, of the appropriations touching this claim, I submit that the item quoted from the act of March 3, 1877, plainly includes it.

The claim being for an "occupation" (*i. e., appropriation*) for several years by the Army, I apprehend that under the act of 1864, chap. 240, (July 4,) it is not cognizable by the Court of Claims (9 Wall., 45; sec. 13, *id.*, 623, 633, 636,) and therefore cannot be transmitted by you (5 Court of Claims, 55) to that tribunal under section 1063 of the Revised Statutes.

Although the provision of the act of 1864 above referred to has not been brought forward into the Revised Statutes, it appears by section 5596 of that revision that it is still in force, inasmuch as *no part* of the act is embraced in such revision.

After saying this much upon matters incidental to the question above put, it seems that in consequence of the opinions heretofore given by this Department as to the meaning of section 191—opinions quoted in your communication—I need only submit the following more direct answer to that question, that is, that before signing a requisition the Secretary of War will consider whether there be "any facts" which in his judgment affect the correctness of the balance certified by the Comptroller; if there be, he will "submit" them to that officer. Upon such submission it is for the latter alone to "decide" upon their importance and effect. The Secretary of War has herein no veto upon the Comptroller; and is not officially interested in the results to which that officer in such matters may come.

If I am to assume that *the record* sent by you contains the whole case, and therefore that there are not "any facts," as is above suggested, I have to say that you "must issue the requisition without regard to your views upon the merits."

The papers inclosed with your communication are herewith returned.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

THE SECRETARY OF WAR.

Approved.

CHAS. DEVENS.

Ruling in the Clark Thread Company Case.

RULING IN THE CLARK THREAD COMPANY CASE.

The ruling of the Secretary of the Treasury in 1876 in the case of the Clark Thread Company—namely, that if a “manufacture of steel” is known to be an integral and important constituent of a machine which when set up will comprise a “manufacture of iron” imported at the same time, both manufactures must be assessed as *steel*, no matter that by distinct invoices, packages, and values they have been so arranged as to be readily separable by officials—is not warranted by the provisions of the statute, (section 2504 Rev. Stats., schedule E,) and ought not to govern similar cases pending.

The regulation issued by the Secretary of the Treasury prior to the year 1875, commencing with the words, “On all articles manufactured from two or more materials,” &c., is in such cases reasonable, and should be applied.

DEPARTMENT OF JUSTICE,
June 30, 1877.

SIR: Yours of the 26th instant, addressed to the Attorney-General, has been considered, and herewith I submit a reply:

Your communication refers to a case presented to your immediate predecessor by an appeal of the Clark Thread Company of Newark, N. J., from a decision by the collector at New York, upon an importation of certain manufactures of iron and steel, and calling attention to the rule laid down by the Secretary in affirming the decision below, as well as to a previous decision upon a similar matter by Secretary Bristow, and a regulation of the Department which preceded both decisions, you ask whether your action should be guided by the last decision or by the regulation.

Although it is not expressly so said, I infer that this question concerns matters of official business now pending before you.

The state of this case, then, is as follows:

Congress having provided that on the importation of the following articles the following duties shall be paid, viz: (1) “All manufactures of steel, or of which steel shall be a component part, not otherwise provided for, 45 per centum *ad valorem*.” (Rev. Stat., p. 468, bottom); and (2) “Manufactures * * * not otherwise provided for, * * * iron * * * 35 per centum *ad valorem*,” (*ibid.*, p. 471, top.) The

Ruling in the Clark Thread Company Case.

Secretary of the Treasury, prior to the year 1875, issued this regulation : "On all articles manufactured from two or more materials, the duty is to be assessed at the highest rates at which any of its component parts may be charged. Where, however, different parts of machinery, or the like, are composed of different materials, which, even though in the same package, are readily separable in classification and assessment of duty, each will be classified according to the material." Under this law and regulation there was presented to Secretary Bristow, in 1875, a case of the importation of machinery, some portions of which were steel and others iron, such respective portions being separately packed and their weight separately stated in the invoice ; and it was held that, as the value of the separate portions was not given in detail, the whole was dutiable as steel at 45 per centum. Afterwards, in 1876, was presented to Secretary Morrill the case of the Clark Thread Company, which had imported a quantity of machinery, the invoices, packages, and valuations of the *iron* portions of which were separate from those of the portions composed of steel or of *steel combined with iron* ; and it was held that "as the steel forms an integral and important constituent of the machine, and is absolutely essential to its proper workings," the importation, notwithstanding the separate invoices, &c., was an *entirely*, and so was within the above decision of Secretary Bristow.

Mr. Bristow's decision refers for authority to a decision made in 1872 by Secretary Boutwell, who held that inasmuch as in the case before him "the invoices of the machinery in question (of iron and steel) were made out so that the value of the different portions thereof were separately stated, and also that the steel portions of the machinery were separately packed, so that their value could be readily verified by examination," those different portions were to be charged with separate duties. I therefore understand the facts before Secretary Bristow to present a case within the administrative regulation above quoted, *i. e.*, one in which the highest rate of duty was to be assessed, because the different materials were not "readily separable" in *assessment*. Whatever may be thought of the Secretary's judgment—that the iron and steel were not, in fact, *readily separable for assessment*

Ruling in the Clark Thread Company Case.

(and I see no reason to question it)—it seems that he gave to the regulation the scope proper thereto when he applied it to a matter of mere *administration*. According to this, readily separable means readily separable as items in the revenue customs act by officials required to execute it. This is the proper sphere of a *regulation*, which ordinarily, in point of theory, can neither enlarge nor restrain a statute, and, in point of effect, can be said to do so only so far as parties having intercourse with the Department which issued the regulation unreasonably fail to conform that intercourse thereto.

The decision of Secretary Morrill goes further, and holds that if a “manufacture of steel” is known to be “an integral and important constituent of a machine” which when set up will comprise a “manufacture of iron,” imported at the same time, both manufactures must be assessed as *steel*, no matter that by distinct invoices, packages, and values they have been so arranged as to be readily separable by officials whose duty it is to separate, for tariff purposes, articles which are manufactures of iron from those which are manufactures of steel.

Inasmuch, therefore, as the decisions quoted in the Clark Thread Company case are not precedents for the decision there made, I have to inquire whether the Revised Statutes warrant the principle laid down, as above quoted, by Secretary Morrill.

The question turns upon the meaning of the word “manufactures,” as used in the provisions above quoted.

Congress has chosen not to use the word *machine* in this connection. The meaning of the word *manufacture* is more extensive than and includes that of the word *machine*. In some cases a manufacture may be a machine, in others not. The customs act renders manufactures dutiable whether machines or not, *i. e.*, dutiable simply in their character as manufactures. If a merchant import a machine in such condition, as regards invoices, packages, &c., as to be an integral whole, it is no doubt to be treated as a single “manufacture,” and whether it be such whole may, within reasonable limits, as above, be defined by regulation. But if there be nothing in the *manner* of the importation thereof to *consolidate* manufactures of iron and manufactures of steel, the natural meaning

Indian Treaties.

of the enactments above quoted requires their separation as much as that of any other items liable to duty. If for tariff purposes the customs officials can deal with a certain article as a manufacture, it seems to me that, in thereupon instituting an inquiry whether that article be not upon its face part of some *machine*, they travel out of the record.

I therefore submit that the principle above quoted from the case of the Clark Thread Company is not that which should govern the similar cases now before you, and also that the regulation quoted above is in such case reasonable, and should be applied.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

CHAS. DEVENS.

INDIAN TREATIES.

Stipulations in Indian treaties existing prior to June 20, 1874, for the payment of annuities, &c., are contracts within the meaning of the second *proviso* of the fifth section of the act of June 20, 1874, chap. 328, and their fulfillment is not to be prevented by any operation given to that section.

DEPARTMENT OF JUSTICE,

July 5, 1877.

SIR: In reply to yours of the 30th ultimo, addressed to the Attorney-General, asking whether stipulations made by the United States prior to June 20, 1874, under treaties with Indian tribes, for the payment of annuities, &c., in consideration of the surrender of lands, &c., by such tribes, be *contracts* within the meaning of that word in section 5 of the act of 1874, ch. 328, I herewith submit an answer in the affirmative; and consequently that the *fulfillment* of such stipulation is not to be *prevented* by any operation given to such section.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

CHAS. DEVENS.

GOVERNMENT ADVERTISEMENTS.

Opinions of August 4, 1876, and May 21, 1877, upon the scope and effect of sections 853 and 854 Rev. Stat. in regard to Departmental advertising, reconsidered and reaffirmed.

DEPARTMENT OF JUSTICE.

July 7, 1877.

SIR: Yours of the 19th ultimo, addressed to the Attorney-General, has been considered, and herewith I submit a reply.

The opinions given by the Attorney-General and his immediate predecessor, (dated August 14, 1876, and May 21, 1877,) upon the scope of sections 853 and 854 of the Revised Statutes, referred to in papers inclosed with your communication, were the result of more than ordinary consideration.

Upon reconsidering the subject in connection with the special questions submitted by you, it still appears that there is no escape from words which, taken merely in connection with the present question, are as follows: "For publishing any notice required by law, or the lawful order of any Department [or] Bureau, in any newspaper, forty cents per folio," &c. As against language so definite and imperative, suggestions drawn from the general scope of the act in which it occurs are of little effect.

It is not rare to find in statutes legislation which is exceptional as regards their general body and purview. Exigencies often render it necessary to make avail of any pending bill (*a passing vehicle*, as it were) to carry a provision that otherwise for want of time, &c., would fail of enactment. But here the title of the bill, by the expression "and for other purposes," puts the reader, at the outset, upon inquiry whether its provisions are *limited* to officers and employés of *courts*. Where words are of themselves ambiguous, their particular *location* may control the meaning. But that is not the case here. So great is the significance of the words *Department* and *Bureau*, that if section 853 is to be restrained so as to operate merely upon *courts*, this result can only be attained by such a suppression of the former words as is virtually *legislation*, and so action to which officers who merely interpret or administer laws are not competent.

Cadets at the Naval Academy.

Nor has any reason been suggested why the United States should pay for notices required by the lawful order of a *Department* a greater rate than for those required by the lawful order of a *court*. Both classes of notices are equally important and equally imperative, and they alike are paid for out of the public treasury. It seems to me that the proper answer to a question arising from the *location* of this provision, limiting *Departments*, is that the attention of Congress was called to its propriety by the circumstance that it had in hand the matter of limiting *courts* upon the same point, and thereupon, it probably having been suggested that the relation of printers to the public treasury under an order of a *Department* required regulation as much as where under an order of a *court*, nothing appearing to the contrary, the regulation was *extended* accordingly.

Without saying that I would have concurred in the conclusion arrived at by Attorney-General Cushing in a like case (6 Opin., 502) if the incidents to the legal question before me had been those presented to him, I have to call attention to the material circumstance that several statutes relied upon to justify his conclusions have since been repealed.

Very respectfully, your obedient servant,

S. F. PHILLIPS.

Solicitor-General.

The SECRETARY OF WAR.

Approved.

CHAS. DEVENS.

CADETS AT THE NAVAL ACADEMY.

The provisions of article 36 of the Articles for the Government of the Navy (sec. 1624 Rev. Stat.) does not extend to cadets at the Naval Academy. They may accordingly be dismissed from the Academy and from the naval service for misconduct without trial by court-martial. Sections 1519 and 1525 Rev. Stat. leave no right in the Secretary of the Navy to continue at the Academy cadets who have been found at any examination deficient in their studies without the recommendation of the academic board.

Cadets at the Naval Academy.

DEPARTMENT OF JUSTICE,

July 10, 1877.

SIR: I have considered the two following questions of law contained in yours of the 5th instant, addressed to the Attorney-General, and herewith submit replies:

1. Can a cadet be dismissed from the Naval Academy and the naval service for misconduct without trial by court-martial?

2. Has the Secretary of the Navy the right to continue at the Academy cadets who have been found deficient in their studies without the recommendation of the academic board?

The provision of article 36, section 1624 Revised Statutes, referred to by you, is: "No officer shall be dismissed from the naval service except by the order of the President or the sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof."

There are three sorts of officers known to the Navy, viz., *commissioned*, *warrant*, and *petty*, (sec. 1410;) and inasmuch as by section 1024, article 30, *petty* officers may be "discharged from the service with bad-conduct discharge" by order of a *summary* court-martial, it seems that by "officers," in article 36, is meant, at most, only *warrant* and *commissioned* officers.

Cadets at the Naval Academy have neither warrants nor commissions; the object of the studies and discipline to which they are subjected during the whole of the course at the Academy is to fit them for appointment as midshipmen, (sec. 1521,) the *lowest* grade of officers of the line, (sec. 1362,) or as second assistant engineers, (sec. 1394,) the lowest grade of officers of the Engineer Corps, (sec. 1476.) They are, therefore, by statutory definition, not to be included, in general, in legislation confined to "officers" of the Navy. In the early days of the Academy, when the students were merely a collection of midshipmen, this was different.

The meaning of the word *cadet* is to the same effect. As a cadet-midshipman is, *ex vi termini*, not a midshipman, and a cadet-engineer not an engineer, so a cadet-officer or a cadet simply is not an officer.

It may be suggested that, as article 36 confers a *privilege*, it should receive a liberal construction, and include persons

Cadets at the Naval Academy.

that are *inchoate* officers. It is not necessary to consider the legal principle underlying this proposition *absolutely*; for it is evident that the privilege conferred by article 36 is upon members of a class who come within a rule very strictly construed, *i. e.*, *who are subject to trial by court-martial*. There can be no liberal construction of the terms which give jurisdiction to courts-martial. Mr. Wirt's celebrated opinion (1 Opin., p. 276) has rendered this familiar to military men in this country. That opinion demonstrated that cadets at West Point are liable to court-martial, by quoting various statutes which expressly so provided. The whole process of his reasoning is equally convincing that no mere implication can subject students at Annapolis to this jurisdiction. This puts an end to the discussion; for no statute has provided in words that they shall be subject to such jurisdiction, *except that of 1874, chap. 453, upon "hazing."*

Cadets at Annapolis, therefore, not being in general liable to court-martial, are consequently not entitled to a privilege which (art. 36, *supra*) evidently is given only to such as are liable in general.

I am therefore of opinion that regulation 169 (Regulations of 1876) is valid, and *reddendo singula singulis* is to be read thus: For *hazing*, cadets are to be dismissed by a court-martial; for the other offenses *following* punishable by dismissal, they are to be dismissed by the *Secretary of the Navy*; whilst for still other offenses *following*, they are to be otherwise punished as the *superintendent* may direct.

This result virtually answers your first question in the affirmative.

2. Sections 1519 and 1525 of the Revised Statutes, originally enacted in 1862 and 1864, appear to me to answer your second question in the negative as regards cadet-midshipmen and cadet-engineers, respectively, when found deficient *at any examination*. I suppose that this question is limited to deficiency so found. (Regulation 131.)

In the presence of such express positive provisions there is no need to say more; but I may be allowed to add that these provisions also appear to be wise and according to the reason of the thing; and that in their absence it would only be in very rare and hardly conceivable instances that the "care

Graduates of Naval Academy—Relative Rank.

and supervision" intrusted by article *one* (Regulations, 1876) to the Secretary of the Navy, which, in general, is only legislative in its nature, and so to be shown by general regulations and not by *pro re nata* interventions, could authorize an unrecommended revision of a sentence for *deficiency*. Such intervention would lead to insubordination on the part of the students, and so would become a fruitful parent of discord amongst the authorities of the Academy.

Now, however, there can be no such intervention by any body in presence of the above legislation, which, it may be well to observe, itself took the place of a regulation to the same effect which, with slight modifications, may be traced back through the "Regulations" of 1863, 1860, 1855, 1853, 1851, and 1850, the only collections of the by-laws of the Academy between these dates that I have been able to see.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF THE NAVY.

Approved.

CHAS. DEVENS.

GRADUATES OF NAVAL ACADEMY—RELATIVE RANK.

The words "final graduating examination," in section 11 of the act of July 16, 1862, chap. 183, and "graduating examination," in section 12 of the act of July 15, 1870, chap. 295, signify that examination which, under the regulations of the Naval Academy, takes place after the prescribed term of sea-service has been performed.

Assignments of relative rank, as between members of the same class, based upon the results of such examination, are in conformity with law.

DEPARTMENT OF JUSTICE,

August 7, 1877.

SIR: Herewith I submit to you replies to your communications of April 19 and May 23, addressed to the Attorney-General, in reference to the cases of Ensign Qualtrough and Master Turner and other gentlemen heretofore, respectively, their classmates at Annapolis, which cases, with some incidental differences, stand a good deal upon the same grounds of law.

Graduates of Naval Academy—Relative Rank.

These cases are of more than usual interest and importance for they involve questions of rank and precedence amongst members of a profession in which rank and precedence form high motives to heroism and self-devotion. The country calculates upon the existence and force of these motives. They are recognized and fostered both by the law and by public opinion. Therefore it is that public action tending to disappoint these motives, and consequently to impair their effect in general, must be treated as of universal concern; and any action duly arraigned upon such account must be subjected to more than ordinary scrutiny.

Master Turner's case depends in great degree upon the meaning of the words "*final graduating examination*" in the act of 1862, chap. 183, sec. 11, and Ensign Qualtrough's in the same degree upon the meaning of the phrase "*graduating examination*" in the act of 1870, chap. 295, sec. 12. The termination of Master Turner's four years' course at Annapolis—which termination he contends was his *graduation*—took place in 1869; Ensign Qualtrough's in 1871. The former, therefore, is not affected by the act of 1870 nor the latter by that of 1862, so far as this was superseded by that of 1870.

The complaint made by each gentleman, for himself and his associates, is, that their *relative rank* in their respective classes, has been fixed very much by the results of an examination ordered a year or more after that which they understand to have been their *graduation*; the above statutes of 1862 and 1870 having provided that such rank should be fixed at their "*final graduating*" examination and at their "*graduating*" examination, respectively. This presents the ground of their complaint substantially, omitting for the present some matters which are incidental and will be mentioned again before I conclude.

Upon the other side the facts are admitted to be as above suggested, but it is contended that Congress used the words above quoted as they *generally* are at institutions of learning, and meant to designate the examination which uniformly from the foundation of the Academy, both by regulations and in practice, had severed the connection of the student, as such, with the Academy, excepting that in *practice* (only) for the years of the war, and the greater or less confusion which con-

Graduates of Naval Academy—Relative Rank.

tinued for several years thereafter—*i. e.*, from 1861 to 1869, inclusive—no competitive examination was had after students left the walls of Annapolis, and so their relative rank remained as then ascertained.

If the organization and discipline of the Naval Academy were in general a matter of *statutory* provision, it is probable that the present difficulties would not have arisen. Such statutory system might have provided a context explanatory of the words above quoted. As it is, however, the Naval Academy, whose existence is due to a wise act of mere Departmental administration on the part of Secretary Bancroft, in 1845, owes its organization substantially to *regulations* adopted from time to time by him and his successors. The above act of 1862 is the earliest legislation that concerns the interior management of the Academy, and what has been since enacted touches that management only here and there incidentally:

Inasmuch, therefore, as Congress has authorized the successive heads of the Navy Department to govern the Academy by regulations, and has interfered therewith only, so to say, desultorily, the rule of statutory construction, which forbids any disturbance of previously existing statutory or common law by a new statute further than is necessary to its reasonable operation, must be applied here so as to prevent any unnecessary disturbance of previously existing *regulations*.

Upon examining some dozen editions thereof, running from 1847 to 1876, I find it to be true that, according to the regulations, *sea service* for several years (and “other than in practice ships”) has uniformly been a part of the academic course at the Naval Academy since its establishment until now. The only editions in which that service is not expressly mentioned are those of 1851 and 1876, and I am told that these were not intended to, and, as a matter of fact, did not change the routine previously existing. I am not called upon to argue the propriety of such a regulation; it is enough for me in my place to know that it has existed.

Leaving out the exceptional period above mentioned, (1861–1869,) this regulation, so far as I am informed, has also always been *executed*.

Naval education before the establishment of the Academy was of course obtained in great measure whilst the student

Graduates of Naval Academy—Relative Rank.

(midshipman) was undergoing sea service. The earliest appointees to the Academy, (I do not speak of the midshipmen who were at first *collected* from service and sent thither,) which appointees were designated *acting* midshipmen, after a partial course on shore were sent to sea for several years, and then returned to Annapolis and finished their studies there. These appointees at the close of the *earlier* course on shore received a certificate which testified to their fitness to go to sea; and before the end of their sea service they became midshipmen, continuing, however, to be students of the Academy. Subsequently (1851) the *two* previous courses *on shore* pursued by appointees to the Academy, one before and the other after sea service, were consolidated into a single term of four years preliminary to sea service. This system has continued in existence ever since; the above act of 1862 in the meantime requiring students to be styled midshipmen throughout the whole course, and this style having been again changed to that of cadet-midshipmen by the above act of 1870.

In the regulations approved August 28, 1846, it is stated that the partial course therein required from acting midshipmen before being sent to sea was (art. 12) "to ascertain whether their qualifications and deportment are calculated to reflect credit upon the Navy," and the "Plan of the Naval School," of same date, shows (paragraph 7) that the determination of that question was referred to the superintendent and academic board, and that the practical result of their approbation was that the acting midshipman was "retained in the service and sent to sea." See also Regulations of 1850, p. 6, (2.)

I apprehend that this regulation presents the germ of the idea that the approbation of the superintendent and academic board given at the end of the four years' course on shore should be *graduation* and their certificate thereof a *diploma*. The Regulations of 1850, which precede the consolidation of the two courses on shore, speak (chap. 9, sec. 2) of the *successful termination of the whole course, including sea service, as graduation*; but those of 1851, which effected that consolidation, and which, as I have said, are silent as to sea service, first use the word *graduate* in the peculiar sense

Graduates of Naval Academy—Relative Rank.

which prevails at Annapolis, applying it to an academic act *during*, not at the end of, the academic course; *i. e.*, to an act which originally was intended to certify that the student might well be “sent to sea.” At all events, since 1851 *graduation* is used in the above local and peculiar sense at the Naval Academy. The regulations subsequent to 1851 (except those of 1876) upon their face restore sea service *after* graduation as a part of the academic course; and that, since those of 1876, sea service continues to be a part of the course, is evident by comparing the definition of cadet-midshipmen in the act of 1870, chap. 295, with the provisions of the act of 1877, chap. 111—such comparison showing that “cadet-midshipmen,” (which is, being translated, “students at the Naval Academy,”) “during such period of their course of instruction as they shall be at sea in other than practice ships, shall receive as annual pay not exceeding \$950.” (19 Stats., p. 390, 2d par.)

By the above-cited plan of the Naval School, (par. 9,) the examination at the end of the whole course, including sea service, was called the “final examination,” and upon the face of all the regulations since that time (excepting, as above, those of 1851 and 1876) the results of this examination have entered as an important element into the determination of the relative rank of classmates.

It follows, therefore, that in the academic vocabulary at Annapolis the adjectives “final” and “graduating,” in connection with “examination,” have a technical meaning; that of the former (whilst not substantially differing from its usual sense) corresponding with *graduating* as ordinarily employed at institutions of learning, and that of the latter differing materially from its common acceptation, being no more *graduating* as usually understood than the *diploma* then given is a diploma as usually understood. After “graduation,” in the local sense, the academic course at Annapolis runs on in another sphere, and the sum total of the study and discipline to which the acting or cadet midshipmen (*i. e.*, students at the Academy) have been subjected whilst under tutors and governors is summed up into one grand result at the final examination, the *list* is made out, and then they cease to be “students.”

I have hitherto been speaking, of course, without reference

Graduates of Naval Academy—Relative Rank.

to the effect of the statutes above cited, or to that of any possible *usage* at the Academy contradictory to the face of the regulations.

I now turn to consider these; and *first* the statutes:

The act of 1862, chap. 185, sec. 11, (12 Stats., 585), so far as important here, is as follows: "That the students at the Naval Academy shall be styled cadet-midshipmen until their final graduating examination, when, if successful, they shall be commissioned ensigns, ranking according to merit."

In light of the fact that at the Academy there were two examinations, one *graduating*, the other *final*, I think that this act does not change the system previously existing. Whether we take the adjectives in their *common* or in their *local* sense, the result is the same; in the former sense they mean the graduating examination as ordinarily understood at institutions of learning; in the latter sense there is such a contradiction of meaning that they must be without effect to disturb the law as existing previously; in this sense they refer as clearly to the "final" as to the "graduating" examination, and of course must be imperative to attach to the "graduating" examination that which till then had been an incident of the "final" examination.

2. I also submit that the *usage* from 1861 to 1869 does no vary the state of Master Turner's claim. Usage during war contradictory to written law amounts, of course, to nothing. Professor Soley's History of the Academy refreshes the recollection as to the confusion at the Academy during that time. Nor can I think that usage for the first four years after the war (when *usage* in most respects, especially concerning military matters, had hardly subsided within its *banks*) can have such effect, especially as all the while the published regulations duly reminded both authorities and students at the Academy that such usage was abnormal.

In this immediate connection a very singular circumstance may be noticed. The act of 1862 provides that the "final graduating examination" shall determine both *rank* and *promotion*. In 1864 the Secretary of the Navy asked the Attorney-General whether, for the purposes of *promotion*, (the question did not extend to *rank*,) the examination so designated was the *final* or the *graduating* examination, as understood at

Graduates of Naval Academy—Relative Rank.

Annapolis. The Attorney-General answered that the act meant thus to designate the *final* examination. (11 Opin., 158.) Accordingly the act afterwards practically received this construction for *promotion*, but the obvious conclusion as to *relative rank* also was not drawn until after 1869. The practical construction of the statute has therefore been self-contradictory, and upon this account, if upon no other, must be without effect to control the obvious meaning of the words in which the statute is clothed.

I come now to consider the provisions of the act of 1870, chap. 295, sec. 12, cited on behalf of Ensign Qualtrough and his associates. These are as follows:

"That the students in the Naval Academy shall hereafter be styled cadet-midshipmen. * * * When cadet-midshipmen shall have passed successfully the graduating examination at said Academy, they shall receive appointments as midshipmen, ranking according to merit, and may be promoted to the grade of ensign as vacancies in the number allowed by law in that grade may occur." (16 Stat., 334.)

There is nothing in the title of the act from which this passage is taken (An act making *appropriations*, &c.) to throw light upon the question before me. However, among its provisions other than those making appropriations is one (sec. 10) reducing the number of ensigns in the Navy to one hundred. By the act of 1862, quoted from above, their number had been 144, and by an act of 1866, (14 Stats., 222,) then in force, it had been increased to 160. As the act of 1870 so much diminished the number of ensigns, it was probably thought that it should also alter the provision above quoted from the act of 1862, making all graduates ensigns; for a provision fixing the number of ensigns in time of peace at one hundred was inconsistent with a provision that all who passed the final graduating examination at the Naval Academy (that is, perhaps fifty or more per year) should *ipso facto* become ensigns. It was therefore determined to reduce the grade of students at Annapolis, and consequently of graduates also, by *one degree*, and provide that graduates ("midshipmen") should be promoted to ensigns thereafter as vacancies might occur.

It is true that this may not have been the whole of the

Graduates of Naval Academy—Relative Rank.

mischief intended to be remedied by the words above quoted. But, at all events, it was a mischief then fresh, and certainly also provided for. The precise and complete manner in which that mischief is implied and is provided for contrasts strongly with what is suggested to have been further intended in using the word *graduating*. For in the latter case a matter is conjectured to have been regarded by Congress as a *mischief* as the consequence of a *further conjecture* that Congress used a word in another than its usual and popular sense. There is no evidence that Congress regarded the regulations giving promotion and relative rank at Annapolis as mischievous, other than the imputation that it has used the word *graduating* in the local and very special sense prevailing at Annapolis.

The emphatic parts of the provision seem to me to be those as to reduction of grade and the method of promotion to ensign; the other parts being merely cursory and the objects of only partial attention.

But even in the absence of the illustration in the very section before us that Congress was not then inadvertent to the rule that *mischiefs* should be declared or clearly implied in a statute which represses them, I should be disposed to question as somewhat strained and unreasonable the proposition that this statute indicates that Congress regarded the regulations at Annapolis upon promotion and relative rank as mischiefs requiring to be overruled. For, in determining the meaning of the word "graduating" in this act, we are shut up to the following alternatives: (1) Congress used the word in the local sense peculiar to Annapolis, and thereby cut off acquisitions during sea service from the academic course of study and from effect upon relative rank, or (2) Congress used the word in its ordinary and popular sense, and so left the academic course and the elements entering into relative rank undisturbed.

I find great difficulty in concluding that Congress, which has (otherwise than here) uniformly abstained from prescribing the academic course at Annapolis, and has (I may say) *wisely* left to the suggestions of professional experts, made through the Secretary of the Navy, the determination of what studies best tend to produce accomplished naval officers, and

Graduates of Naval Academy—Relative Rank.

also the character of the elements which ought to establish relative merit (and so relative *rank*) amongst classmates, is to be supposed, from the use of a single *ambiguous* word, to have made a revolution in this general policy and practice.

It may be said that inasmuch as the statute under consideration exclusively concerned an institution which used *graduate* in a special sense, the rule that Congress generally employs words in their peculiar meaning must give way to the rule that laws are to be interpreted according to their subject-matter. It is true that none of the cases in the Supreme Court of the United States which illustrate the rule for the interpretation of words that have two meanings, one technical, the other general, are upon all fours with the present, but a recent case in the English court of exchequer seems to me to be entirely so. The instrument there before the court was a policy of insurance. It is needless to say that the rules for interpreting contracts and statutes are very much the same. The policy was upon certain premises, the business carried on in which necessarily disengaged large quantities of a highly inflammable and explosive vapor. In this state of things the policy contained the following clause: "Neither will the company be responsible for loss or damage by explosion, *except* for such loss or damage as shall arise from explosion by gas." The vapor on the premises, (gas,) having caught fire, caused a destructive explosion, and a suit was brought to recover damages.

It seems that in such a case, if in any, it might well have been said that the policy was to be explained by its subject-matter, viz, a business producing a *peculiar* vapor, or gas, and so covered, amongst others, any explosion caused as above. But the court (Kelly, Martin, and Channell) were unanimous in saying that "gas" was to be taken in its *ordinary and popular* sense, and, so, meant only illuminating gas. (*Stanly vs. Ins. Co.*, L. R., 3 Exch., 71.)

The mere fact, therefore, that the act of 1870 concerned an institution at which *graduating* has a *peculiar* meaning does not make it an exception to the rule requiring that word to be taken in its *usual* meaning.

To these observations upon the construction of the act of 1870 is to be added the remark that, although Congress has

Graduates of Naval Academy—Relative Rank.

not since modified its provision which makes *graduation* the event which changes grade and fixes relative rank, yet by the act of 1877, ch. 111, as we have already seen, sea service, "other than in practice ships," is referred to as being at present a part of the "course of instruction" at Annapolis, and as occurring before a change of grade on the part of the students: "That cadet-midshipmen, during such period of their course of instruction as they shall be at sea in other than practice ships, shall each receive as annual pay not exceeding nine hundred and fifty dollars." (19 Stat., 390.) It should be observed that this is only a statutory *reference* to the circumstance, and *not a positive enactment*, that "students at the Naval Academy" during a part of their "academic course" (act of 1873, chap. 230) are *at sea*. It therefore occurs to ask, by what *previous* provision of law then in force did sea service become a part of that course? The act of 1873, which fixed the "academic course" at *six years*, does not answer this question, except, perhaps, by way of further reference to antecedent *regulations*. Indeed, it cannot answer the question in any sense, if it be true that an act in force at the time of its enactment (*i. e.*, the act of 1870, chap. 295, which in 1873 was the last preceding statute upon the subject) did substantially, as suggested by Ensign Qualtrough, blot sea service from the academic course. For the mere lengthening of the academic course in 1873 cannot of itself be construed as changing graduation from *before* to *after* sea service; and in the meantime, as we have seen, the regulations of 1870 had *dropped* the reference to sea service which previous regulations had made so uniformly. It seems to me, therefore, that the interpretation suggested by Ensign Qualtrough for the act of 1870 is contradictory to what the act of 1877 shows Congress understood to have been the state of the law at that time.

As another consideration to the same effect, I remark that Congress has acquiesced in the construction which the academic authorities have given to this act as well as to that of 1862. The weight to be attributed to this acquiescence may be ascertained by observing that the object of the acts was of great public as well as of great private interest. Legislation upon private rights may well be left to litigation be-

Graduates of Naval Academy—Relative Rank.

tween those interested, and thereupon to the construction of the courts, but legislative determination of what the public requires in regard to candidates for high places in the Navy is obviously so far a different thing, that gross errors in those who administer it are not to be left uncorrected by the authors of this rule. Such errors would, no doubt, receive early attention and rectification by Congress, in the interests of the public, probably as to the actual decision, and certainly to govern future cases.

If members of the classes of 1869 and 1871 have any legal ground for complaint, so also those of the classes of 1870 and 1872 and every succeeding year; for, plainly, any officer of the class of 1870 or 1872, who has had that which would have been his standing by *ante-sea-service* record reduced by the effect of the *final* examination, may claim the protection of the acts of 1862 and 1870 as completely as may members of the class of 1869. It is true for both, or for neither, that the *final* examination had no legal effect upon relative rank.

At the beginning of this opinion I have alluded to some incidents connected with the manner in which the class of 1869 were ordered to the final competitive examination that have been complained of by Master Turner and his associates. Upon consideration I am of opinion that, whatever else may be thought of them, they do not affect the questions of law before me. Of these are the circumstance (1) that whereas the classes immediately preceding had not, during eight years, been subjected to a competitive examination after "graduating," (in the local sense,) the class of 1869, after having left Annapolis and been at sea for a year or so, without previous notice were ordered to undergo such an examination; (2) that the *value* in former years assigned to this examination in fixing rank was, without notice, as above, greatly increased; and (3) that the class was not examined in one body but in separate sections, at times separated by more than a year.

The first of these circumstances is one to be regretted. Notice should have been given before graduation. Yet it is remarkable that the language of the regulations then in force, which contemplated a "final" competitive examination, did not in fact put any of the students upon inquiry as to the

Contract—Withdrawal of Bid.

foundation of the practice prevailing immediately before. In any event, although the incident is disagreeable, it does not affect the lawfulness of the order.

The second circumstance is perhaps still more to be regretted. There was nothing in the regulations to give notice of the extraordinary effect upon rank thus assigned to the final examination. But the order herein was not plainly beyond the Secretary's *power*, and therefore I cannot advise that this detail therein regulated should be corrected.

The last circumstance is an imperfection as to the practical working of the "final" examination, which is referred to in the regulations as unavoidable, and yet as insufficient to nullify other advantages arising from that requirement. It of course affects alike all such ever held at Annapolis. It cannot be considered to render them illegal.

Upon the whole, therefore, I have to advise you that the assignments of relative rank heretofore made in the cases both of Master Turner and of Ensign Qualtrough and their associates ought not to be disturbed.

With high respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE NAVY.

Approved.

CHAS. DEVENS.

CONTRACT—WITHDRAWAL OF BID.

Under the act of August 14, 1876, chap. 267, advertisement was made for proposals to build certain locks on the Muscle Shoals Canal. Proposals having been received from several bidders in response thereto, these were opened May 15, 1877, when it appeared that S. was the lowest bidder. Afterwards, on the same day, a telegram was received from him withdrawing his bid; and again, on the 18th of June, his bid was withdrawn by letter. On the 27th of July, S. was formally notified that the contract for building the locks had been awarded to him, but he, by letter dated July 30, declined to enter into it: *Held* that S. had a *locus penitentia* until acceptance of his bid, during which period he was at liberty to withdraw it; and that, the withdrawal of his bid having taken place prior to its acceptance, neither he nor his sureties are liable upon the guaranty which accompanied the bid. Section 3944 Rev. Stat. has no application to this case. *Held*, further, that the other bidders are not released, and that the contract may be awarded to the one whose bid is lowest.

Contract—Withdrawal of Bid.

DEPARTMENT OF JUSTICE,

August 28, 1877.

SIR: Yours of the 13th and 27th instants, addressed to the Attorney-General, so far as material to the views expressed below, contain the following statement:

"Under authority from this Department an advertisement, dated April 18, 1877, was published by Capt. W. R. King, Corps of Engineers, the officer in charge of the improvements being made by the United States on the Tennessee River, inviting proposals for building five locks on the Muscle Shoals Canal. The proposals received in response to this advertisement were opened May 15, 1877, when it was found that Mr. James E. Slaughter, of Mobile, Ala., was the lowest bidder for the work. (Bid and guaranty herewith.)

"Mr. Slaughter, however, claims that his bid was withdrawn before the bids were opened by Major King, or, at all events, upon the 18th of June, and therefore declined to consider himself a bidder. The facts of the case are particularly set forth in a letter from Captain King to the Chief of Engineers, dated June 5, 1877, (inclosed herewith,) from which it seems that about two hours after the last bid was opened and the result made known to all present, a telegram withdrawing the bid was presented by a Mr. Duffy, of Chattanooga, who claimed to be Mr. Slaughter's agent, and to whom the telegram was addressed.

"Upon the 18th of June, Mr. Lines, as attorney for Slaughter, by letter addressed to myself, again withdrew the proposal.

"By the act making the appropriation under which the proposed locks are to be built, ('An act making appropriations for the construction, repair, preservation and completion of certain public works on rivers and harbors, and for other purposes,' approved August 14, 1876, (19 Stat. p. 132,) the Secretary of War is required to apply the moneys herein appropriated as far as may be by contract, except where specific estimates cannot be made for the particular work, or where, in the judgment of said Secretary, the work cannot be contracted at prices advantageous to the Government, * * * and such contracts shall be made with the

Contract—Withdrawal of Bid.

lowest responsible bidder therefor, accompanied by such securities as the Secretary of War shall require.

"By my direction Captain King was, therefore, instructed by the Chief of Engineers to formally notify Mr. Slaughter that the contract had been awarded to him. Accordingly that officer, under date of August 1, 1877, informs the Chief of Engineers that he formally notified Mr. James E. Slaughter, on the 27th of July, that the contract for building five locks on the Muscle Shoals Canal had been awarded him by the Secretary of War, and incloses copy of a letter received by him from Mr. Slaughter, dated July 30, 1877, declining to enter into any contract for the building of the five locks referred to or to accept the award. The guarantors of Mr. Slaughter in this case are reported to be good for the difference between his bid and the next lowest.

"All the papers in the case are respectfully transmitted, with request for your opinion on the following points:

"1st. Whether Slaughter and his sureties are liable on their covenant executed to the United States?

"2d. Whether the other bidders are now to be regarded as released so that a new advertisement is necessary for a new letting, or whether the award may properly be made to the lowest of the other bidders who shall adhere to his bid and signify his willingness to accept a contract thereunder?"

I have considered the case and questions above presented, and may indicate my general conclusion by saying that I am unable to perceive any difference as to the points particularly in question between biddings made under sealed envelopes and other biddings at auction. The statute which in this case requires the Secretary of War to contract with the lowest bidder does not *ipso facto* impose such contract upon him so soon as he, whether personally or as here by agent, has found, so far as bare inspection can discover it, who that lowest bidder is. This and other incidents have to be *passed upon* by him before his discretion in respect of this duty is at an end. In this connection I quote the following passage from the judgment of the court of appeals of New York, in a case where proposals to keep a canal in repair had been advertised for by a public board under a statute which required the contract to be made with the lowest bidder who

Contract—Withdrawal of Bid.

should contemporaneously give adequate security ("guaranty") for its performance—the special question being whether one who appeared to the court to be the lowest bidder, and to have duly given adequate security, could compel the board by *mandamus* to award the contract to him. "The powers conferred upon the board necessarily involved and implied an exercise of discretion, although it seems exceedingly clear what decision their duty required them to make in this case. But they are to determine who is the lowest bidder and what is adequate security. * * * The right in the case before us is exceedingly plain, but it is after all only a right to a correct decision. The relator has no contract, no right to any specific act, free from all discretion in the contracting board." *The People vs. The Contracting Board*, (27 N. Y., 378.) The party therefore who seems to the world, even to the highest court of judicature, to be the lowest bidder, otherwise duly qualified, is not such technically until he has been so accepted by the officer intrusted with that duty. This principle settles the question before me. Slaughter had the *locus paenitentiae* ordinarily belonging to bidders until it had been decided by the Secretary that the bids showed that the work might be done under contract, (act of August 14, 1876,) and also that he was the lowest bidder otherwise qualified, and that he was accepted as such. The opening of Slaughter's bid was no more than the making it known to the United States. It is not the other party's *knowledge* of the bid, but his *acceptance* of it, that creates the *contract*, from which neither party can recede. The acceptance in the present case was notified to Slaughter on the 27th of July last, his bid having been withdrawn on the 16th of May, and *ex abundanti cautela* again in June; or, in other words, his bid never was accepted, as it was not *in esse* when the acceptance purported to be made.

There is nothing about this case to prevent an application of the rules of the common law, for the act of Congress preventing to a certain extent the withdrawal of like bids has been limited in its application to those made in connection with mail contracts, (Rev. Stat., sec. 3944,) whilst the *guaranty* accompanying this bid is for the acts of the bidder "after being notified of the acceptance of said bid."

Loyalty of Claimants.

There is no doubt that by either of these means, *i. e.*, a properly-worded statute or guaranty, the recurrence of such a disappointment may be prevented in future. No apprehensions therefore can be indulged in as to the effect of this decision upon future transactions with the Government.

I therefore answer the questions stated above as follows: 1st. Slaughter and his sureties are not liable upon their covenant. 2d. The other bidders are not released; and unless their bids indicate that "the work cannot be contracted at prices advantageous to the Government," the lowest bid existing at the time of acceptance may properly be accepted.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF WAR.

Approved.

CHAS. DEVENS.

LOYALTY OF CLAIMANTS.

It is not the duty of the accounting officers of the Treasury to require of claimants under the act of March 3, 1849, chap. 129, (section 3483 Rev. Stat.,) proof of loyalty.

Statutes imposing disabilities are not to be extended by construction.

DEPARTMENT OF JUSTICE,

September 6, 1877.

SIR: Yours of the 10th of May last, addressed to the Attorney-General, requests his opinion "as to the duty of the accounting officers to require proof of loyalty in cases arising under the act of March 3, 1849," (Revised Statutes, section 3483.)

The inclosure sent by you shows that by "loyalty" above is meant not present loyalty but loyalty during the recent rebellion. In point of law there is no present *disloyalty* within the United States. In some cases, however, acts of Congress require from persons making claims before the accounting officers of the United States proof that at a particular critical point in the past they were loyal as a condition precedent to a recovery. The question here presented is in effect whether

Loyalty of Claimants.

that requirement includes claims under the statute above mentioned. For I think it very plain that, unless Congress has provided that proof of the *loyalty* (defined as above) of claimants shall be a condition precedent to their prosecuting claims before the accounting officers of the United States, it is not competent for such officers to attach such a condition by mere *regulation*. Regulations may define the methods of enforcing disabilities imposed by law, but are not of themselves competent to impose them.

The precise case here is that Congress has not expressly attached this disability to parties making claim under section 3483, either specifically or by any law of general application to claimants. This being so, a question arises whether the circumstance that in several cases, which in ordinary judgment stand substantially upon the same footing as the above, Congress has imposed such disability authorizes a judicial officer to presume an intention by Congress to extend such disability to cases not covered by *action* either specific or general. A plain statement of this question answers it, or there is an end to the maxim *expressio unius est exclusio alterius*.

Congress has never passed upon the question whether a general test of loyalty should be applied to all persons having claims against the United States. The statute books show that such question has been considered only *pro re nata*—so far, I mean, as it concerned special classes of claimants who from one time to another needed legislation *in their favor*. The class now under consideration had been provided for by an act passed in 1849—a time when there was nothing in the state of the country to demand such a test. It has therefore happened that, when the time came for inquiring into the loyalty of claimants, no general law upon the subject having been enacted and no special law in their behalf having been asked for by the class before us, these have escaped legislation entirely.

It seems probable that this is the true account of the present state of the case. But, whether such state results from the inadvertency or the design of Congress, it cannot be amended by those who have the law to administer. Statutes imposing disabilities are not to be extended by construction.

In conclusion, I submit to you my opinion that it is not the

Sale of Blank Manifests and Clearances.

duty of the accounting officers to require of claimants under the above act of 1849 proof of loyalty.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved.

CHAS. DEVENS.

SALE OF BLANK MANIFESTS AND CLEARANCES.

The amount received by the customs officers on the northern frontier for each blank manifest or clearance sold under section 2648 Rev. Stat. is a fee intended for the use of the officer, and does not come within the provision of section 3617 Rev. Stat., requiring "the gross sums of all moneys received, from whatever source, for the use of the United States," &c., to be paid into the Treasury.

DEPARTMENT OF JUSTICE,
September 27, 1877.

SIR: I have considered yours of the 18th instant, addressed to the Attorney-General, asking "whether the money, or any portion thereof, received by collectors on the northern frontier from the sale of blank manifests and clearances, under the provision of section 2648 Revised Statutes of the United States, is required to be deposited into the Treasury," and herewith submit my opinion in the negative.

In this connection I have given attention to sections 3617 and 2675 of the Revised Statutes, referred to you.

The money which is required to be paid into the Treasury by such officers of the United States as have received it is defined by section 3617 as "the gross sums of all moneys received, from whatever source, *for the use of the United States, except*," &c.—an exception not material here. The money in question is received by certain collectors and surveyors under section 2648, by the terms of which they "are authorized to keep on sale at their several offices blank manifests required for the business of their districts, and to charge the sum of ten cents, and no more, for each blank which shall be prepared and executed by them."

Sale of Blank Manifests and Clearances.

I think it plain from the purview of this provision that the "ten cents" is an official fee, intended for the use of the officers mentioned. The word "authorized" and the expression "and no more" intimate: the *former*, that those officers had been previously exercising *questionable* power of the same sort; and the *latter*, that their personal interest in the amount required a check. To the same general purpose is the relation of the payment in question to a *personal service* by the officer; a slight compensation for a small service.

This being so, the money is not received "for the use of the United States," nor is it any part of a "gross amount" of money, a portion of which is for the use of the United States, within section 3617, above. It is all for the use of the officer.

Nor is the circumstance that, if by means of such and other receipts the compensation of the officer shall exceed twenty-five hundred dollars per annum, the excess (by sec. 2675) is to be paid into the Treasury an argument to show that this money is received to the use of the United States within the meaning of that section, any more than that similar provisions in relation to their respective maximums oblige marshals, clerks, and district attorneys to pay into the Treasury, the two former their fees in suits in court, and the latter his salary and certain specified fees sometimes received from the United States during the year. Such fees have to be accounted for as part of the maximum, but the interest of the United States therein is created or at least manifested by a subsequent event, and in the meantime the rule *de non apparentibus et non existentibus* must apply. In such cases it is not the specific fees that are turned in (in the present case) under section 3617, but the *excess* of all, consolidated, by section 2675; which can only be done after the excess is ascertained.

Very respectfully, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

CHAS. DEVENS.

Duty on Brandy.

DUTY ON BRANDY.

The additional duty of 20 per centum *ad valorem*, which is imposed by section 2900 Rev. Stat. by way of a penalty for undervaluations, can have no application to an undervaluation of brandy where the brandy, being under first proof, is by appraisement worth not above four dollars per gallon.

DEPARTMENT OF JUSTICE,

February 9, 1878.

SIR: Yours of the 30th ultimo, addressed to the Attorney-General, states for his consideration the following case and questions:

"Messrs. Cook & Bernheimer imported into the port of New York one hundred cases of brandy, which was invoiced and entered at the custom-house at a value of 20 francs per case, or about 9 francs per gallon. The appraiser reported that the strength of the brandy was below the degree of first proof, and that the correct value thereof was 24 francs per case. From this advance over the entered value an appeal was taken for reappraisement in the manner provided by section 2930 of the Revised Statutes. The value found on such reappraisement was 22 francs per case. This advance was 10 per cent. more than the invoice and entered value. The collector of customs thereupon, in addition to the regular duties, assessed a duty of 20 per cent. *ad valorem* on said brandy under section 2900 Rev. Stat., which provides that, 'when the appraised value shall exceed by 10 per centum or more the value so declared in the entry, then, in addition to the duties imposed by law on the same, there shall be collected a duty of 20 per centum *ad valorem* on such appraised value.'

"The importers duly protested and appealed to this Department against the assessment of such additional or penal duty, claiming that brandy under the statute pays a specific duty, and that the case did not come within the provisions of the section of law above quoted.

"Although no distinction is made in terms by the said section between goods subject to an *ad valorem* duty and those subject to a purely specific duty, this Department has heretofore held that merchandise paying a purely specific duty is not liable to the said additional or penal duty.

Duty on Brandy.

"The existing provisions of law on the subject will be found in schedule D, section 2504 Revised Statutes, and are as follows:

"1st. 'Brandy, and on other spirits manufactured or distilled from grain or other materials, and not otherwise provided for, \$2 per proof gallon. Each and every gauge or wine gallon of measurement shall be counted as at least one proof gallon.' * * * This was taken from the twenty-first section of the act of July 14, 1870, and was in force on the 1st of December, 1873; and

"2d. 'No lower rate or amount of duty shall be levied, collected, and paid on brandy, spirits, and other spirituous beverages than that fixed by law for the description of first proof, but it shall be increased in proportion for any greater strength than the strength of first proof; and no brandy, spirits, or other spirituous beverages under first proof shall pay a less rate of duty than 50 per centum *ad valorem*.' * * * This latter provision was taken from section 2 of the act of June 30, 1864, which imposed a duty of \$2.50 per gallon on brandy and spirits at proof and under, which rate was repealed by the act of 1870 aforesaid.

"It is under the last clause that the collector of customs at New York took the ground that the brandy in question was not absolutely subject to a purely specific duty; but it may be stated that the brandy in question, notwithstanding its advance in value, was liable only to the specific duty of \$2 per gallon.

"The questions upon which your opinion is desired are: First, whether the duty of 50 per cent. on spirits, under first proof, is to be recognized as a legal one, in view of the provision in schedule D, that each and every gauge or wine gallon of measurement shall be counted as at least one proof gallon; and, second, if the validity of such duty shall be recognized, whether the 20 per cent. additional duty was properly assessed."

The practical construction by which the act of 1870, cited above, was held, previously to the enactment of the Revised Statutes, to repeal the act of 1864, upon the same subject, seems to have been probably correct. I say *probably*, because the question now before you renders it unnecessary to pro-

Discharge from Military Service.

nounce more definitely thereupon. If there were a repeal, it remains unaffected by the circumstance that *both* provisions have been brought forward into the Revised Statutes. For they are brought forward with the same effect as they had previously, *i. e.*, as being in conflict; that of 1870 remaining an expression of the latest will of Congress. The face of the record (in the Revised Statutes) still shows as much as before (in the Statutes at Large) that the act of 1864 had been repealed, and therefore that its reproduction is an inadvertence.

But it is unnecessary to decide absolutely that the act of 1870 repealed that of 1864. For, if the *ad valorem* tax mentioned at the close of the language quoted by you from section 2504 has been applicable to any importations since the passage of the act of 1870, it certainly has not been to an importation of a brandy which, when properly appraised, was worth no more than four dollars per gallon; which is the case of the brandy now in question.

The undervaluations to which, in practice, the penalty of 20 per cent. has been applied have been, and for good reasons, such as were made in order to defraud the Government of revenue. This is not true of undervaluations of articles subject to a specific tax, and therefore not of undervaluations of *brandy in general*; *i. e.*, of any brandy, except such as, being under first proof, is also by appraisement worth more than four dollars per gallon.

I therefore answer the second question put by you in the negative. This, as I have before said, renders it unnecessary to say more about the first question.

With great respect, your obedient servant,

S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF THE TREASURY.

Approved.

CHAS. DEVENS.

DISCHARGE FROM MILITARY SERVICE.

In January, 1863, M., then colonel of a regiment of Wisconsin volunteers in the military service of the United States, was by order of the President dismissed the service without trial. In October, 1863, the Presi-

Discharge from Military Service.

dent issued the following instructions: "Let the order dismissing Colonel M. be revoked, and he ordered to report to General Grant, as above advised, with the modification that the ordering a court-martial be in the discretion of General Grant." In November, 1863, these instructions were returned to the President by the Secretary of War, with the information that the restoration of M. to the command of the regiment, his successor having already been appointed and mustered in, was impracticable; and the President took no further action in the case: *Advised* that it is not now competent to the Secretary of War to publish the said instructions of the President, and, in execution thereof, to grant M. an honorable discharge as of the date of the muster-in of his successor.

DEPARTMENT OF JUSTICE,
February 12, 1878.

SIR: Yours of August 18, 1877, addressed to the Attorney-General, states the following case and questions:

"Col. R. C. Murphy, of the Eight Regiment of Wisconsin Volunteers, on the 16th of January, 1863, was dismissed the military service of the United States without trial, by order of the President—Mr. Lincoln—upon the recommendation of Generals Halleck and Grant, under date of October 24, 1863. Mr. Lincoln directed that the order dismissing Colonel Murphy should be revoked.

"These instructions were returned to the President by the Secretary of War, November 8, 1863, with the information that it was impracticable to restore Colonel Murphy to his commission in the Army, inasmuch as his successor, appointed by the governor of Wisconsin, had been duly mustered into the service of the United States, and was then in command of the regiment.

"It does not appear that Mr. Lincoln took any further action in the case.

"In this state of the facts, which are set forth more fully in detail in the papers herewith submitted to you, I would solicit your opinion whether it is competent for the Secretary of War now to publish the last order of President Lincoln in the case, and in execution of that order to grant Colonel Murphy an honorable discharge as of the date of the muster-in of his successor, and whether, upon such action having been taken, he will be entitled to his pay for the *interim* between his dismissal and the date of his discharge?" &c.

Discharge from Military Service.

By the papers submitted with your letter, it appears that the terms of the order made by President Lincoln were as follows: "Let the order dismissing Colonel Murphy be revoked, and he ordered to report to General Grant, as above advised, (*i. e.*, in a report made by Judge-Advocate-General Holt,) with the modification that the ordering a court-martial be in the discretion of General Grant."

It must be allowed, for the reason submitted by your predecessor, as above, that this order was and is a nullity; and it is to be added that neither in form nor substance is it one which a court, or any officer acting only *judicially*, *i. e.*, having no other power than that of interpretation, can separate into such parts as are valid and such as are invalid, and declare that upon its face its author is seen to have regarded the former as of chief importance, and the latter as not indispensable. A rule laid down as regards statutes, in Cooley on Constitutional Limitations, at page 178, is applicable:

"If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently; then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them."

It is hardly necessary to say that this rule is equally applicable to every act of State, whether legislative or executive.

President Lincoln has left nothing to guide an inquiry whether his purpose, as indicated in the order, underwent modification upon his being advised that as made it was invalid, much less as to the character of that modification, and that it is *his discretion alone* that is now to be ascertained and executed. I therefore conclude that such order cannot be

Product of Fisheries.

decomposed and modified, *ex. gr.*, in the manner suggested by the terms of your questions. It would be a mere *surmise* to pronounce this or that element in the order the one chiefly intended by President Lincoln; and to carry such surmise into execution would be substantially to violate the rule of administration, which forbids a direct reversal or change of his will thereupon, as the same may be ascertained under the ordinary rules of interpretation.

I have purposely omitted consideration of the question "whether in any case, and if so when, it is allowable to revive and execute a military order left in abeyance for so long a time as the above;" and I here call attention to this omission by way of caveat against such question being concluded by anything that I have said.

I conclude therefore by submitting for your consideration negative answers to the questions which you have asked.

Very respectfully, your obedient servant,
S. F. PHILLIPS,
Solicitor-General.

The SECRETARY OF WAR.

Approved.

CHAS. DEVENS.

PRODUCE OF FISHERIES.

The term "fishery," in the legal parlance of the United States and Great Britain, primarily denotes one of that class of objects of property known as *things incorporeal*; and such is its signification as used in article 21 of the treaty of May 8, 1871, between those countries.

Accordingly the phrase in that article, "produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward Island," covers only the produce of incorporeal things so denominated belonging to those governments respectively.

Canada and Prince Edward Island derive no right under the treaty to import into the United States free of duty fish, &c., caught by their subjects no matter where, nor do the United States derive thereunder a corresponding right against Canada and Prince Edward Island.

DEPARTMENT OF JUSTICE,
March 8, 1878.

SIR: I have considered the case stated in yours of the 2d instant, and herewith submit my opinion thereupon.

Produce of Fisheries.

The communication made to you by the Secretary of the Treasury upon the 26th ultimo, a copy of which accompanies and is made the basis of your inquiry, is as follows:

"I have the honor to acknowledge the receipt of your letter of the 15th ultimo, in which you transmit a copy of a letter dated the 12th of December last, and accompanying papers, from Messrs. W. A. Wood & Co., of New York, which involve a construction of the 21st article of the treaty of May, 1871, between the United States and Great Britain.

"That article of the treaty provides that for the term of years mentioned in article 23, fish oil, and fish of all kinds, except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil, being the produce of the fisheries of the United States, or the Dominion of Canada, or Prince Edward Island, shall be admitted into each country, respectively, free of duty.

"From the correspondence submitted, it appears that the Canadian authorities have excluded from free entry a lot of sperm oil, partly upon the ground that it was not the product of fish caught within the territorial limits of the United States, and that there are no whale fisheries which belong to the United States which do not equally belong to all nations of the world.

"As opposed to the construction thus given by the Canadian authorities it may be contended that the clause in the treaty referred to permits the free entry of fish and fish oil caught by vessels licensed by the respective governments to engage in the fishing trade irrespective of the locality of the catch.

"The free list of the Revised Statutes exempts from duty oil—spermaceti, whale, or other fish—of the American fisheries, and all other articles the production of such fisheries, and under this provision of law the articles named, caught in any waters of the world by American vessels licensed to engage in the fisheries, are exempt from duty on arrival in any port of the United States.

"It is an open question, however, whether this rule necessarily applies in the construction of the treaty; and, inasmuch as this is the first case which has arisen involving a construction of that clause of the treaty, it is respectfully suggested

Product of Fisheries.

that the question be referred to the Attorney-General for his opinion on the question of law involved.

"Should your Department see fit to adopt this course, I will be obliged for a copy of the opinion which the Attorney-General may give in the premises."

The word *fishery* originally denoted, and in legal parlance in both the United States and Great Britain still generally denotes, one of that class of objects of property known as *things incorporeal*. Where it means, as sometimes it may, either a *place* for fishing or the *business* or *pursuit* of fishing, such exceptional signification is indicated by the context or some other circumstance.

I apprehend accordingly that the meaning of the phrase *produce of the fisheries of the United States* in article 21 of the treaty referred to above, and so *produce of the fisheries of the Dominion of Canada or of Prince Edward Island*, is produce of incorporeal things, so denominated, belonging to those governments respectively, as contradistinguished from produce of any *business* of citizens of the United States or subjects of Canada or Prince Edward Island, carried on, not because of their rights as such citizens or subjects, but *jure naturæ*. The expression *jure naturæ* in this connection seems to be proper even although the business be *licensed* by the Government, for such license is merely a revenue regulation, and neither asserts nor confers any special interest in the business licensed.

As I have said, such is presumptively the extent of the term *fishery*, and in the treaty this presumption seems confirmed by the context. For in article 18 the meaning of "fishery" evidently is a certain thing belonging to the Dominion of Canada and of Prince Edward Island, and in article 19 it is equally a certain thing belonging to the United States. The removal in article 21 of the terms in the preceding articles, confining the effect of the word *fishery* to certain bays, coasts, and parallels of latitude, whilst it extends such effect to all bays, coasts, &c., leaves the *quality* of such word untouched; *i. e.*, confirms the presumption arising from the word itself that the contracting parties were stipulating in reference to some object of property.

It is true that this view is one that is merely technical, but

Produce of Fisheries.

it may be observed that the *policy* of the treaty seems to the same effect. That policy, so far as special, grows out of the territorial proximity of the parties. The condition of things which rendered mutual *trespasses* by fishermen of the several governments in a manner unavoidable has suggested mutual *licenses*, which in turn have given rise (to a certain extent) to mutual *free trade* in the produce of fisheries. But that liberality which would have suggested free trade as to certain articles of the produce of the industry and enterprise of citizens of the several countries, *no matter where exercised*, is nowhere suggested by the general objects and *quid pro quos* of the treaty. These have a definite scope, the ordinary meaning of the word fishery first above given being *within*, and the other meaning mentioned in the above communication being *without*, that scope.

To the same effect are the suggestions arising from a perusal of the *free list* in article 3 of the treaty with Great Britain of June, 1854. That list included many important products of Canada, Prince Edward Island, &c., besides those of *fish*, but required for all that they should be "*the growth and produce* of the aforesaid British colonies or of the United States."

That treaty was duly terminated a few years since by a *notice* given by the United States, as provided therein. The treaty of 1871 renews a free trade as to only one class of the articles in the list of 1854. The words made use of as to that are not identical in the two treaties; but the change is not significant, or, at most, is ambiguous, and meanwhile the general context and subject-matter indicate that the purpose in each treaty as to the point under consideration was the same, such indication corresponding with the spirit in which the like provision in the treaty of 1854 had been terminated.

The expression quoted by you from "the free list of the Revised Statutes" imposes for its own purposes upon the word fishery a special definition, but by all known rules of interpretation this definition extends no further. The general use of the word by the law-makers, officers, and writers of both the United States and Great Britain is, as I have already said, different.

Upon the whole, it is my opinion that the United States did not intend by the treaty of 1871 to confer upon Canada

Product of Fisheries.

and Prince Edward Island a right to import into this country, free of duty, fish, &c., caught by their subjects, no matter where; and, similarly, I am of opinion that they did not stipulate in their own behalf for a corresponding right as against those governments.

Very respectfully, your obedient servant,

S. F. PHILLIPS,

Solicitor-General.

The SECRETARY OF STATE.

Approved.

CHAS. DEVENS.



INDEX.

ABEYANCE OF OFFICE.

See **COLLECTOR OF CUSTOMS**, 1, 2; **SURVEYOR OF CUSTOMS**.

ABSENCE WITHOUT LEAVE.

See **DESERTION**, 7.

ACCOUNTS AND ACCOUNTING-OFFICERS.

1. By the second section of the act of February 27, 1875, chap. 108, the allowances to be admitted in favor of the railway companies settled with under that act are limited to the following subjects: First, payments made by them in cash; second, credits authorized by the general course of the business regulations of the Departments for transportation performed; but no abatement or increase in the amount of either the one or the other is admissible. *Page 1.*
2. Sections 273 and 277 Rev. Stat. considered with reference to the relative duties of the Second Comptroller and the Auditor in the settlement of accounts; and *held* that every account falling within the scope of the latter section must undergo, successively, an examination by the Auditor and an examination by the Comptroller—that the action of the Auditor is primary altogether, and not definitive; while the action of the Comptroller is wholly revisory, and final. *139.*
3. The word "settled," as used in section 273, is equivalent in meaning to "finally acted upon." *Ibid.*
4. Where the Comptroller, on revision, does not concur in the action of the Auditor disallowing an account, but finds and admits a balance arising thereon; or where he disagrees with the Auditor in allowing an account, and rejects it; or increases or diminishes the balance reported by the Auditor in such account,—in any of these cases the account is *by the action of the Comptroller* finally adjusted, and further action by the Auditor is not required. *Ibid.*
5. The purpose of section 191 Rev. Stat. is to declare the *effect* of the settlement of an account by the accounting-officers of the Treasury as regards the executive branch of the Government, not to define or explain the duties of those officers relative to the settlement itself; and the provisions thereof comprehend all balances arising upon settlement of accounts, which it becomes the duty of the Comptroller to certify to the heads of Departments. *Ibid.*
6. Accordingly, where an account against the Government is disallowed by the Auditor, who in consequence reports no balance due thereon,

ACCOUNTS AND ACCOUNTING-OFFICERS—Continued.

but transmits the account with his action to the Comptroller for revision, and the latter officer, upon examination, finds and admits a balance due the claimant: *Held* (assuming the action of the Auditor and of the Comptroller to appear in due form) that nothing more remains to be done by either officer *to complete the settlement of the account*, but that the Comptroller should certify the balance which he finds and admits, accompanying his certificate with evidence of the action of the Auditor in the same matter. 140.

7. Where the Comptroller's certificate is unaccompanied by the Auditor's action, or does not affirmatively (by recital or otherwise) show that the account has been acted upon by the latter, the head of Department to whom the balance is certified should withhold his requisition for payment until satisfactory evidence on that point is produced. *Ibid.*
8. The action of the Auditor need not be incorporated in the certificate of the Comptroller, nor form part of the same document. *Ibid.*
9. Section 191 of the Revised Statutes is limited to cases where *balances* are found upon the settlement of accounts or claims, and certificates thereof are transmitted to the head of the proper Department for his warrant or requisition; it does not extend to any case where no balance is certified, or where the whole account or claim is disallowed. 192.
10. The prohibition in that section against changing or modifying balances certified by the Commissioner of Customs and the Comptrollers of the Treasury does not apply to these officers. *Ibid.*
11. The provision making their findings "conclusive upon the executive branch of the Government" signifies only that such findings are not to be revisable by any other officer or officers of that branch of the Government. *Ibid.*
12. Whether the Comptrollers and Commissioner are authorized to *reopen* settlements made by themselves or their predecessors in office depends upon considerations founded on the law as it stands independently of the said section; its provisions have no bearing on this subject. *Ibid.*
13. It is not the duty of the accounting officers of the Treasury to require of claimants under the act of March 3, 1849, chap. 129 (section 3483 Rev. Stat.), proof of loyalty. 652.

See CLAIMS, 6, 7, 8; COMPENSATION, 1.

ACTS OF FORMER ADMINISTRATION.

See ADMINISTRATIVE PRACTICE, 1, 2.

ADMINISTRATIVE PRACTICE.

1. Where application was made to the Secretary of the Interior for a review of the action of his predecessor in office and of the Executive in a case passed upon by them during the preceding administration—the application resting solely upon the ground of alleged error in the construction of a statute: *Advised* that the former action in the case cannot with propriety be reviewed. 208.

ADMINISTRATIVE PRACTICE—Continued.

2. It is a settled rule of administrative practice that the official acts of a previous administration are to be considered by its successor as final, so far as the Executive is concerned. *Ibid.*
3. Where an application was made to the Secretary of the Interior to review a decision of his predecessor, but it did not appear that any new facts in the case were presented, nor that any change in the law had taken place since the decision was made: *Held* that the principle of *res adjudicata* applies, and *advised* that the former decision be adhered to. 315.

See CLAIMS, 17; LANDS, PUBLIC, 4; NAVY, 8.

ADVERTISEMENT FOR PROPOSALS.

See CONTRACT, 2, 3.

ADVERTISEMENTS.

1. Sections 853 and 854 Rev. Stat. (though modified by a *proviso* in the act of March 3, 1875, chap. 128, with respect to the advertisement of certain mail lettings) are still in force, without modification, with respect to advertising of the Treasury Department. Opinion of August 14, 1876, reaffirmed. 282.
2. Section 5 of the act of July 12, 1876, chap. 680, providing for the publication of lists of property in arrears for taxes, does not authorize the Commissioners of the District of Columbia, in determining the "lowest bidder" for making such publication, to have regard to the circulation of each newspaper bidding. It is sufficient if the paper is a *bona fide* newspaper and there is nothing as to the amount of publicity which the notice may receive that will defeat the purpose of the legislature in requiring the advertisement. 324.
3. The advertisement of the list of property in arrears for taxes, under section 5 of the act of July 12, 1876, chap. 180, would not be in conformity to the laws in force in the District of Columbia if made in a newspaper published on Sunday. 326.
4. The provisions of that act must be construed in connection with the other statute law of the District, and they are not to be taken to repeal any part of the latter unless where necessarily repugnant thereto. *Ibid.*
5. In October, 1875, the Postmaster-General requested the publisher of a newspaper in Alabama to insert therein an advertisement of proposals for carrying the mail in that State, provided he would do it for a sum not exceeding \$688.12. The advertisement was duly inserted, and the publisher claims therefor \$1,992, the latter amount being agreeably to the rate fixed by the Clerk of the House of Representatives under section 3823 Rev. Stat.: *Held* that section 3941 Rev. Stat., and not section 3823 Rev. Stat., furnishes the law applicable to this case; that under the former of these sections the Postmaster-General had power to select the medium of advertising the proposals and to limit by agreement

ADVERTISEMENTS—Continued.

the compensation therefor, and that the publisher is bound the same as he would be in an ordinary case of compliance with a request conditioned like the above. 527.

6. The joint effect of sections 853 and 3826 Rev. Stat., as regards Government advertisements in newspapers published in the District of Columbia, was to allow the compensation fixed by section 853, unless (under section 3826) that be more than is paid by private individuals for like services. But section 1 of the act of 1875, chap. 128, repeals section 3826 for every purpose connected with claims for such services. 594.
7. Opinions of August 14, 1876, and May 21, 1877, upon the scope and effect of sections 853 and 854 Rev. Stat. in regard to Departmental advertising, reconsidered and reaffirmed. 633.

ALIEN.

See LANDS, PUBLIC, 1.

APPEALS IN CUSTOMS CASES.

1. An appeal to the Secretary of the Treasury, taken under section 2931 or 2932 Rev. Stat., is determined, when the Secretary, having arrived at a conclusion either favorable or adverse to the appellant, makes known his decision to the official in his Department charged with the matter of the appeal. 119.
2. The Secretary is not bound to give notice of his decision to the appellant; the latter must inform himself thereof at his peril. *Ibid.*
3. Suit may be instituted by appellant without having first obtained a decision from the Secretary, if decision on his appeal is not made within the times specified in said sections. *Ibid.*
4. The ninety days within which suit must be brought begin to run from the date of the decision, where the duties are paid before the decision, and from the date of payment where the duties are paid after the decision. *Ibid.*

APPOINTMENT.

1. The officers designated in section 2 of the act of March 3, 1875, chap. 130, as "deputy comptroller," "deputy commissioner of customs," "deputy auditor," and "deputy register," should be appointed by the President, with the advice and consent of the Senate. Section 169 Revised Statutes does not give the head of the Treasury Department authority to appoint them. 3.
2. That act creates in each of the bureaus referred to a new office, under the designation of "deputy comptroller," &c., and tacitly abolishes the existing office of chief clerk therein; but it makes no provision on the subject of appointment to the newly-created offices. *Ibid.*
3. The general rule deducible from article 2, section 2, of the Constitution, is that the appointment to any office of the United States established by Congress must be made by the President, with

APPOINTMENT—Continued.

the concurrence of the Senate, unless it is otherwise provided in the Constitution or by legislative enactment. *Ibid.* (See *infra*, par. 11.)

4. The President has power to fill, by temporary appointment, in a recess of the Senate, a vacancy then existing which occurred during the next preceding session of that body. 207.
5. The provision in the act of March 3, 1857, chap. 108, which authorized the appointment of an additional appraiser-general (who was assigned to duty at the port of New Orleans), was repealed by force of section 5596 Rev. Stat. 260.
6. Sections 2726 and 2728 Rev. Stat. do not, by implication, authorize the appointment of a general appraiser, in addition to the number authorized by section 2608 Rev. Stat. *Ibid.*
7. Accordingly no authority of law exists for continuing the office of general appraiser at New Orleans. *Ibid.*
8. There is no authority of law for the appointment of a deputy collector, deputy naval officer, and deputy surveyor at the port of New York without compensation, and then appointing such officers clerks at a larger compensation than that affixed by law to the positions of deputy collector, deputy naval officer, and deputy surveyor at that port. 286.
9. A special deputy (without compensation as such) constituted by the naval officer at the port of New York, under section 2632 Rev. Stat., to perform the duties of the latter in cases of occasional and necessary absence or of sickness, may at the same time be appointed to a clerkship in the office of such naval officer, and be allowed, under section 2745 Rev. Stat., a compensation for his services as *clerk* greater in amount than that affixed by law to the permanent office of deputy naval officer at the same port, provided it do not exceed the rate usually paid for similar services. This case distinguished from the cases considered in the opinion of June 4, 1877. 355.
10. The provision in section 2 of the act of July 27, 1866, chap. 284, giving the Secretary of the Treasury authority to appoint assistant appraisers for the port of New York, is impliedly repealed by section 2536 Rev. Stat., under which latter section the appointment of those officers is in future to be made by the President with the advice and consent of the Senate. 449.
11. In the absence of a statutory provision to the contrary, the appointment of any officer of the United States devolves upon the President with the concurrence of the Senate. *Ibid.* (See *supra*, par. 3.)

APPRAISER-GENERAL AT NEW ORLEANS.

See APPOINTMENT, 5, 6, 7.

APPROPRIATIONS.

1. The *proviso* in the Army appropriation act of March 3, 1875, chap. 133, viz, "That no part of this sum shall be paid for the use of

APPROPRIATIONS—Continued.

any patent process for the preservation of cloth from moth or mildew," does not forbid the application of any patent process to the preservation of clothing where the use of the same may be obtained without paying or incurring any obligation to pay therefor. 37.

2. The appropriation referred to may accordingly be employed in applying the Cowles process, if its use can be had without charge. *Ibid.*
3. The appropriation made by the act of March 3, 1877, chap. 105, to pay the amount due to mail contractors "for mail service performed" in certain Southern States before the war of the rebellion, is not applicable to the payment of a claim for one month's additional pay to which a contractor became entitled by his contract where the same was arbitrarily terminated by the Government, such claim being in the nature of a claim for liquidated damages. 328.
4. The provision in the act of August 15, 1876, chap. 289, making appropriations for the Indian Department for the year ending June 30, 1877, namely, "That amounts now due employees for year ending June 30, 1876, may be paid out of unexpended balance of the incidental fund of said year," considered in connection with section 3682 Rev. Stat., and *held* that under that provision amounts due for clerical or official services in the Indian service for the year ending June 30, 1876, may be paid out of the unexpended balance of the incidental fund of the Indian service for the same year. 434.
5. The term "employees," as used in the same provision, was meant to include all those who performed services in any capacity in the Indian service during the year ending June 30, 1876, whose employment was authorized by law, and whose compensation remained unpaid at the date of the act of August 15, 1876. *Ibid.*

ARMY.

1. The *proviso* in section 2 of the act of March 3, 1875, chap. 178, namely, "That no part of the foregoing act shall apply to those officers [i. e., officers of the Army theretofore retired by reason of disability arising from wounds received in action] who * * * has an arm or leg permanently disabled by reason of resection, on account of wounds," &c., construed. 83.
2. The word "resection" is a surgical term, signifying the removal by excision of dead or diseased bone—more especially the removal of such bone, in that way, from the articular extremities or the unconsolidated extremities of fractured bones. *Ibid.*
3. In order to bring a case within the terms of so much of the *proviso* as is above quoted, the essential circumstances required are: (1) a previous wound, causing some portion of the bone to become diseased or dead; (2) thereby necessitating a cutting off and removal of the dead or diseased part, which is accomplished; (3) whereby the limb is permanently disabled. *Ibid.*

ARMY—Continued.

4. It is sufficient if the disability is in part approximately attributable to the resection, though this be proportionately less than what is due to other contributory causes. *Ibid.*
5. Where an officer was permanently disabled of a limb mainly from the effects of a wound received in battle, and a doubt exists whether part of the disability, at least, was not caused by a resection on account of the wound: *Held* that the officer is entitled to the benefit of the doubt, upon the ground that the law of 1875, operating as it does to take away rights previously granted by law, should not be made to affect those as to whom its application is doubtful. *Ibid.*
6. On the 15th of December, 1870, P., a captain of cavalry was discharged from service, at his own request, under section 3 of the act of July 15, 1870, chap. 294, receiving a year's pay and allowances. On the 19th of May, 1876, he was appointed a second lieutenant of infantry: *Held* that the provisions of the second section of the act of March 3, 1875, chap. 159, do not apply; and accordingly that P. is not required to refund the pay and allowances mentioned. 177.
7. Section 2 of the act of 1875 is limited to those who were mustered out as "supernumerary officers" under section 12 of the act of 1870, and who subsequently to the act of 1875 are reappointed. *Ibid.*
8. A partial resection of an arm or leg on account of wounds received in battle, where the operation is followed by permanent disability of the limb, and the disability is partly owing to such operation, suffices to bring a case within the *proviso* of the second section of the act of March 3, 1875, chap. 178. 199.
9. Congress adjourned March 3, 1877, without providing for the payment of the Army subsequent to June 30 of that year. Inquiry being made whether, if the necessary funds can be furnished by individual contribution, they can properly be used for that purpose, and the Army thus supported until the next session of Congress: *Advised* (after reviewing the constitutional and legislative provisions bearing on the subject) that this means of paying the Army cannot properly be employed by the President. 209.
10. Sections 3679 and 3732 Rev. Stat. should be construed together. The latter section authorizes the heads of the War and Navy Departments, in the absence of appropriations, to purchase or contract for clothing, subsistence, forage, fuel, quarters, or transportation, not exceeding the necessities of the current year; such contracts are not within the prohibition of the former section. *Ibid.*
11. A retired officer of the Army does not vacate his commission by accepting a civil office, unless it be an office in the diplomatic or consular service, in which latter case he is to be regarded as having resigned his place in the Army. From the general law applicable to such case (contained in section 1223 Rev. Stat.), a certain class of retired officers described in the act of March 3, 1875, chap. 178, are excepted. 306.

ARMY—Continued.

12. He is not precluded from holding a civil office that does not belong to the diplomatic or consular service. *Ibid.*
13. H., an assistant quartermaster (whose commission is junior to the commissions of twenty-two other assistant quartermasters), having served as an assistant quartermaster of volunteers from June 9, 1862, to March 22, 1867, and from the latter date as an assistant quartermaster in the Regular Army under his present commission, claimed to be entitled to promotion to the grade of major in the Quartermaster's Department on account of fourteen years' continuous service. An obstacle to immediate promotion being presented by section 4 of the act of March 3, 1875, chap. 126, the question is whether H. is entitled to be promoted upon the next happening of a vacancy in said grade, the provisions of that section not being in the way: *Held* (1) that he is not so entitled on the ground of continuous service; (2) that under existing law the right to promotion, in case of such vacancy, would be governed by seniority of commission, irrespective of the past service of the officer. 330.
14. An order which relieves a soldier from duty in his company, but requires him to immediately report for duty in another branch of the military service, is not a furlough (though it be so styled in the order), but is essentially a detail for other duty, and must be treated as such. 362.
15. The Secretary of War can release a soldier from his contract of enlistment by a discharge, but has no power to suspend it, even with the soldier's consent. *Ibid.*
16. In 1870, B., a retired officer of the Army, was appointed to and accepted the office of consul-general at London. Since his appointment his name has been borne on the Army Register as a retired officer, but he has not received pay as such. He is not of the class of retired officers described in the *first proviso* of section 2 of the act of March 3, 1875, chap. 178: *Held*, upon consideration of the provisions of sections 1094 and 1223 Rev. Stat. (the latter section embodying so much of section 2, act of March 30, 1868, chap. 38, as related to officers of the Army), together with section 2 of the act of 1875 aforesaid, that B. has ceased to be a retired officer of the Army by effect of the statutory provision embodied in said section 1223, and that his name cannot legally be continued on the retired list. 407.
17. Agreeably to the *intent* of Congress, the clause in the second section of the act of March 3, 1875, referring to the provisions of section 2 of the act of March 30, 1868, must be deemed to limit the operation of section 1223 Rev. Stat. *Ibid.*
18. The words "every such officer," as used in the first proviso of section 2 of the act of 1875, cover all retired officers who are included within the preceding part of the same proviso, but do not apply to others. *Ibid.*
19. The provision in the second clause of paragraph 5, Army Regula-

ARMY—Continued.

tions of 1863, for determining the rank of officers of different regiments or corps whose commissions are of the same date and grade, which reads: "2d. By former rank and service in the Army or Marine Corps," considered and construed. 410.

20. The word "Army," as there employed, is to be understood as embracing the entire military forces of the United States, whether regular or volunteer. *Ibid.*

21. The word "service" does not mean service in all capacities, but service in the former rank; *i. e.*, as a commissioned officer. 411.

22. Accordingly, where the former service of two officers was in different grades (whether in the regular or volunteer army), the one who served in the higher grade is entitled to the superior rank; where both officers hold the same grade, the one who served the longer in that grade is to be preferred. *Ibid.*

23. The position of trustee of the Cincinnati Southern Railway—the duties which appertain to it being defined by certain acts of the Ohio legislature, and appointments thereto and removals therefrom from being made by the judges of the superior court of the city of Cincinnati, by which court the compensation of the trustee is also fixed—is a *civil office* within the meaning of section 1222 Rev. Stat., and, therefore, upon acceptance of an appointment to such trusteeship by an officer of the Army his commission in the Army would become vacated. 551.

24. In January, 1863, M., then colonel of a regiment of Wisconsin volunteers in the military service of the United States, was by order of the President dismissed the service without trial. In October, 1863, the President issued the following instructions: "Let the order dismissing Colonel M. be revoked, and he ordered to report to General Grant, as above advised, with the modification that the ordering a court-martial be in the discretion of General Grant." In November, 1863, these instructions were returned to the President by the Secretary of War, with the information that the restoration of M. to the command of the regiment, his successor having already been appointed and mustered in, was impracticable; and the President took no further action in the case. Advised that it is not now competent to the Secretary of War to publish the said instructions of the President, and, in execution thereof, to grant M. an honorable discharge as of the date of the muster-in of his successor. 658.

See INDIAN TERRITORY; MILITARY ACADEMY; RESIGNATION, 3, 4; TRAVELING ALLOWANCES, 4, 5; WITNESS.

ARTICLES FOR THE GOVERNMENT OF THE NAVY.

See NAVAL ACADEMY, 2; NAVY, 1.

ARTICLES OF WAR.

See DESERTION, 1, 5.

ASSIGNMENT.

See CONTRACT 12; PAY ACCOUNTS OF ARMY OFFICERS, 2.

ASSISTANT APPRAISERS AT NEW YORK.

See **APPOINTMENT**, 10, 11.

ASSISTANT U. S. ATTORNEY.

See **COMPENSATION**, 8.

ATTORNEY-GENERAL.

1. The Attorney-General is not authorized to give an official opinion in response to a call from the head of a Department, though the call is made at the request of a committee of Congress, where the question proposed does not arise in the administration of such Department. 138.
2. The Attorney-General is not authorized, by the law creating and defining his office, to give legal opinions at the call of either House of Congress or of Congress itself. His duty to render such opinions is limited to calls from the President and heads of Departments. 475.
3. The Attorney-General cannot with propriety give an official opinion to the head of a Department upon the question whether it is expedient for him to prosecute an appeal in a matter of public interest pending before another Department. 574.

BANKRUPTCY.

Bankruptcy proceedings against members of a partnership individually do not affect relations between such partnership and its creditors or debtors. 28.

BANKS AND BANKERS.

• See **INTERNAL REVENUE**, 4, 5, 8.

BIDDLE MANUFACTURING COMPANY CASE.

Former opinion in this case referred to (see opinion of August 2, 1875), and for reasons stated *advised* that payment of the claim be suspended for a reasonable time, say thirty days. 34.

See **BANKRUPTCY**.

BLANK MANIFESTS AND CLEARANCES.

See **CUSTOMS LAWS**, 29.

BOND.

1. A bond which accompanies a proposal for carrying the mail, though actually signed by the parties thereto in one of the States, is to be regarded as made at Washington, the intended place of delivery. 471.
2. Hence, where a married woman is on such a bond as a surety for her husband, her capacity to enter into the contract for suretyship and thereby to subject her separate property to liability, must be determined by the laws of the District of Columbia. *Ibid.*
3. Under the laws of the District, a married woman cannot thus bind her separate property. *Ibid.*

See **OFFICIAL BOND**.

BONDS OF THE UNITED STATES.

1. The provision in the act of July 14, 1870, chap. 256, requiring bonds issued thereunder to be made "redeemable in coin of the present standard value," does not authorize the Secretary of the Treasury to stipulate in the body of the bond that it shall be redeemed in coin of the standard value existing at the date of the issue of the bond. 233.
2. The word "present," in that provision, refers to the date of the act; and the bond cannot be made otherwise redeemable than in coin of standard value at the date of the act. *Ibid.*
3. Section 3702 Rev. Stat. does not authorize relief to be given in the case of coupons destroyed or defaced after their separation from the bonds to which they were attached. Its provisions apply solely to destroyed or defaced interest-bearing bonds. 438.
4. Coupons, whilst remaining attached to the bonds with which they were issued, are to be regarded as parts thereof, and, if then defaced or destroyed, the case would fall within the section as one of partial defacement or destruction of the bond. But they lose that character after being detached. *Ibid.*
5. Where satisfactory proof is furnished that a registered bond, called in for redemption, has been lost, payment thereof may be made upon a bond of indemnity being given by the owner in conformity with the requirements of section 3705 Rev. Stat. 468.

BOUNTY.

The heirs or legal representatives of deceased colored soldiers enlisted during the rebellion, and borne on the rolls as slaves, are, by virtue of the act of March 3, 1873, chap. 262 (section 4723 Rev. Stat.), entitled to bounty; the effect of that statute being to extend the provisions of the bounty acts alike to all colored soldiers, whatever their former *status* might have been. 474.

BOUNTY-LAND CLAIMS.

The prohibition contained in the joint resolution of March 2, 1867 (the provisions of which are embodied in section 3480 Rev. Stat.) is applicable to claims for bounty land; the intent of Congress being to include therein all manner of claims and demands—not only pecuniary, but other claims as well. 450.

CADET.

See **NAVAL ACADEMY**, 1, 2, 3.

CANAL-BOATS.

See **ENROLLMENT AND LICENSE OF VESSELS**, 1, 2, 3.

CARPET WOOLS.

See **CUSTOMS LAWS**, 9, 10.

CARRIAGES.

See **CUSTOMS LAWS**, 12, 16.

CENTENNIAL EXHIBITION.

See APPROPRIATIONS, 3; OFFICER.

CHECKS OF DISBURSING OFFICERS.

See DISBURSING OFFICERS, 1, 2.

CHICORY ROOT.

See CUSTOMS LAWS, 25.

CHORPENNING CASE.

See CLAIMS, 1, 2, 3. (See, also, Note, p. 26.)

CIGAR-BOXES.

See INTERNAL REVENUE, 13.

CITIZENSHIP.

1. S., a Prussian subject by birth, became naturalized in the United States in 1854. About five years afterwards he returned to Germany with his family, in which was a son, four years old, born in the United States, and became domiciled at Weisbaden, where both father and son have since continuously resided. The son, who is now twenty years of age, having been called upon by the German Government to report for military duty, S. invokes the intervention of the United States legation at Berlin, on the ground that his son is by birth an American citizen, but declines, in behalf of the son, to give any assurance of intention on the part of the latter to return to the United States within a reasonable time and assume his duties as a citizen: *Held* (1) that, under article 4 of the treaty of 1868 with North Germany, the father must be deemed to have abandoned his American citizenship, and to have resumed the German nationality; (2) that the son being a minor, acquired under the law of Germany the nationality of his father, but did not thereby lose his American nationality; (3) that upon attaining his majority the son may, at his own election, return and take the nationality of his birth or retain the German nationality acquired through his father; (4) yet that during his minority, and while domiciled with the father in Germany, he cannot rightfully claim exemption from military duty there. *Advised*, therefore, that the case presented does not call for interference on the part of the American Government. 15.
2. A Spanish subject by birth was naturalized in the United States in February, 1876, and thereupon his son, aged twenty, who was born in the island of Cuba, applied to the State Department for a passport, stating that he had resided in the United States for five years, but that it was his intention to reside in the country of his nativity and engage in business there: *Held* that the son, being a minor at the time of the naturalization of his father, must be considered a citizen of the United States within the meaning of section 2172 Rev. Stat., and that no ground exists for withholding the issue of a passport to him on the score of na-

CITIZENSHIP—Continued.

tionality. *Held*, further, that the circumstance that he intends to return to and reside in the country of his birth does not make him less entitled to a passport than if his intended destination were elsewhere. 114.

3. The laws of the United States authorize the issue of passports to all citizens thereof, without distinction, whether native-born or naturalized. *Ibid.*
4. Accordingly, when a naturalized citizen applies for a passport, though with a view to traveling or residing in the country of his former nationality, his right to have the passport issued to him is just as obligatory upon the State Department as if he were a native-born citizen intending to go to the same country. *Ibid.*
5. An alien woman married F., a naturalized citizen and resident of the United States, who died in 1860. In 1862 she married D'A., an alien, who was domiciled in the United States, but who subsequently died without becoming a citizen thereof. She claims, under section 2 of the act of March 3, 1871, chap. 116, compensation for her separate property taken during the lifetime of her second husband: *Held* that by virtue of the provision of the statute embodied in section 1994 Rev. Stat., the claimant upon her first marriage acquired a permanent status of citizenship, which could be lost only as in the case of other citizens; that this status was not affected by her subsequent marriage; and that she is a citizen of the United States within the meaning of section 2 of said act. 599.

CIVIL OFFICE, ACCEPTANCE OF BY ARMY OFFICER.

See ARMY, 23.

CLAIMS.

1. The award made by the Postmaster-General in favor of George Chorpenning, December 23, 1870, under the joint resolution of July 15, 1870, was not in its nature binding upon the United States until paid, and might be rendered null by the action of Congress at any time prior to its payment. 19.
2. Congress having, before payment thereof, by joint resolution of February 9, 1871, repealed the joint resolution of 1870, under which the Postmaster-General had acted, and by subsequent acts (see 16 Stat., 519, 572; 17 Stat., 82) forbidden payment to be made out of appropriations under control of the Post-Office Department, the award thereupon ceased to have any efficacy. *Ibid.* (See, also, Note, p. 26.)
3. It does not now constitute a valid foundation of claim, and an action would not be maintainable thereon. *Ibid.*
4. By the act of February 18, 1875, chap. 80, which amends the Revised Statutes by adding after section 300 " * * * "section 300 B," the Commissary-General is authorized to examine claims submitted by loyal citizens of the State of Tennessee, and of the

CLAIMS—Continued.

counties of Berkeley and Jefferson, West Virginia, for subsistence stores taken or received during the rebellion. 35.

5. It is not material whether the actual presentation of such claims to him occurred before or after the adoption of that act. *Ibid.*
6. It is not competent to the Third Auditor and Second Comptroller of the Treasury to adjust a claim for alleged loss or damage arising on breach of a contract wherein the government undertook to furnish the claimant with transportation "for men and animals employed for the work, also for the necessary subsistence, forage, materials, machinery, and tools." 39.
7. The authority of those officers to settle claims or accounts of any kind against the United States is derivable solely from legislative enactment. *Ibid.*
8. The statutory provisions conferring upon them authority in that regard reviewed; and held that the authority so conferred does not extend to the settlement of any claims or accounts for compensation for damages (whether the damages were sustained by the loss of property or otherwise) other than such as are of the classes specifically described in those provisions. *Ibid.*
9. To satisfy the requirement of the statute which makes "the loyalty of the claimant" an essential element in a claim presented under the act of July 4, 1864, chap. 240, in order to warrant a recommendation for settlement thereof, proof of a pardon is sufficient. 60.
10. Under section 7 of the act of March 2, 1867, chap. 169, and section 39 of the act of June 6, 1872, chap. 315, also the appropriation act of March 3, 1875, chap. 129, John D. Sanborn is entitled to such sums only as the Commissioner of Internal Revenue (within the limit of the appropriation) has agreed to pay, and the payment whereof is approved by the Secretary of the Treasury, for services of the following description, viz: "For detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided by law." 88.
11. The independent action of each of those officers (the Commissioner and the Secretary) is necessary to warrant payment; neither can delegate to the other his powers. *Ibid.*
12. Previous to the act of June 22, 1870, chap. 150 (sections 363-366 Rev. Stat.), C. & W. were retained, with the approbation of the Solicitor of the Treasury, to defend certain suits brought against R., formerly collector of the port of New York, for acts done by him officially. Services were rendered under this retainer between September, 1873, and April, 1875, which remain unpaid for: Held that the Treasury Department is authorized to settle and pay the claim for these services. 168.
13. In June, 1835, a steamboat was chartered by the Government to run on the Chattahoochee and Apalachicola Rivers, the management of the craft being left in charge of the owners. While

CLAIMS—Continued.

under charter it was accidentally lost by fire: *Held* that the boat was not in the military service, within the meaning of section 2 of the act of March 3, 1849, chap. 129, as amended by section 5 of the act of March 3, 1863, chap. 78, and that the United States incurred no liability for the loss. 205.

14. In February, 1861, and previously, G. had a contract (with the usual provision for one month's pay where service is discontinued) for carrying the mail on route 8076 from San Antonio to Los Angeles, via El Paso, which was by an order of the Postmaster-General issued on the 16th of March, 1861, in pursuance of the act of February 27, 1861, chap. 57, extended until June, 1865. Subsequently, on the 30th of May, 1861, the Postmaster-General issued an order (under the act of February 28, 1861, chap. 61) discontinuing the service between San Antonio and El Paso until it could be safely restored. In 1863 the Post-Office Department declined to make an allowance for discontinuance of service on this part of the route, for the reason that it "stands in the same category with the mass of Southern mail contracts, and must await whatever action is taken on them": *Held* (1) that this was not a final adjudication upon the claim for one month's pay for said discontinuance, but amounted only to a postponement of its consideration, and that the Department is not precluded thereby from now passing upon the claim; (2) that though the action of the Postmaster-General in discontinuing the service was taken under the act of February 28, 1861, the contractor is nevertheless entitled to the one month's pay by virtue of his contract, agreeably to the law as laid down in the case of *Reeside vs. United States* (8 Wall., 38). 364.

15. The Continental Bank-Note Company of New York contracted to furnish and deliver to the Post-Office Department for the term of four years, commencing May 1, 1873, all the adhesive postage stamps which might be required by the Department, and agreed to keep on hand at all times a stock of stamps sufficient to meet all orders of the Department. For the stamps delivered in pursuance of the agreement the company were to be paid at a certain rate per thousand, which was to be "full compensation for everything required to be done or furnished" under the contract. On the 24th of April, 1877, just before the contract expired, a new agreement was made with same company, to commence on May 1, 1877, by which the stamps were to be furnished at a lower rate. At the expiration of the first contract a surplus stock of stamps remained on the company's hands, which were delivered in fulfillment of orders under the second contract, and for which the company claims an allowance at the rate fixed in the first contract: *Held* that the claim is inadmissible, and that the company should only be paid therefor according to the rate fixed in the second contract. 382.

16. The Chesapeake and Ohio Railroad Company, being under no obli-

CLAIMS—Continued.

gation by contract or otherwise, to convey the mail from Charlottesville to the University of Virginia (at which point the company several years ago discontinued its station, and has since declined there to receive or deliver passengers, freight, or mails), is entitled to the sum of \$1,850, withheld from its pay as a mail carrier to defray the expense of that service. 397.

17. Soon after the passage of the act of May 18, 1872, chap. 172, H. filed in the Treasury Department, under the fifth section of that act, a claim for the proceeds of 2,835 bales of cotton. In March, 1875, the then Secretary of the Treasury (Bristow) finally acted thereon, allowing the claimant a certain sum as the proceeds of 104 bales, and formally rejecting the remainder of the claim. Subsequently the claimant made application to the next succeeding Secretary (Morrill) for a reopening of the case, which was denied. Application for a reopening being again made, upon substantially the same grounds as before: *Held* that the decision heretofore made by the Treasury Department upon the claim cannot legally and with propriety be reopened by the present Secretary.

18. In the determination of questions, whether of law or fact, arising upon claims filed under said section, the judgment of the Secretary is not subject to direction or control; he acts independently, even of the Executive.

19. In the matter of the claim of the Burlington and Missouri River Railroad Company of Nebraska, for military transportation: *Advised* (after review of the act of May 15, 1856, chap. 28; sections 18, 19, and 20 of the act of July 2, 1864, chap. 216; section 6 act of July 1, 1862, chap. 120; and joint resolution of April 10, 1869, which relate to the establishment of the road in Nebraska; and upon consideration of the provisions of the acts of June 16 and 22, 1874, and of March 3, 1875, forbidding the payment of military transportation to a certain class of railroads), that payment be withheld from the company until its right thereto is judicially established. 458.

20. C. and F. borrowed from W. a flat-boat, to use in repairing a dredge-boat belonging to the United States, employed in improving the Ohio River. By direction of a subordinate officer of engineers the flat-boat was used in removing a wreck, the removal of which had been ordered by the engineer officer in charge of the Ohio River improvement, who, however, did not direct the flat-boat to be so used. W. subsequently brought suit against C. and F. for this unauthorized use of his property, and recovered judgment against C., the amount of which F. (being on the bail-bond of C.) was ultimately compelled to pay. F. claims reimbursement of the amount from the Government: *Held* that the payment by F. was in satisfaction of damages recovered for a private boat, in respect to which the United States was under no liability whatever; and that, even if it were a valid claim,

CLAIMS—Continued.

it is not within the scope of the appropriation for the Ohio River improvement. 487.

21. The act of February 21, 1867, chap. 57, does not forbid the settlement of a claim for the use and occupation of real estate by the military authorities or troops of the United States after the termination of the war for the suppression of the rebellion, though such use and occupation may have commenced during the war and continued down to the period covered by the claim. 572.

22. An alien woman married F., a naturalized citizen and resident of the United States, who died in 1860. In 1862 she married D'A., an alien, who was domiciled in the United States, but who subsequently died without becoming a citizen thereof. She claims, under section 2 of the act of March 3, 1871, chap. 116, compensation for her separate property taken during the lifetime of her second husband: *Held* that by virtue of the provision of the statute embodied in section 1994 Rev. Stat., the claimant upon her first marriage acquired a permanent status of citizenship, which could be lost only as in the case of other citizens; that this status was not affected by her subsequent marriage; and that she is a citizen of the United States within the meaning of section 2 of said act. 599.

23. The act of March 3, 1877, chap. 106, made an appropriation in these terms: "For payment of amounts certified to be due by the accounting officers of the Treasury Department for transportation of the Army, being for the service of the fiscal year 1871 and prior years," &c. Among the "amounts certified" was an amount found due on settlement of a claim of the State of Kentucky "for the use and occupation by the Army of the United States of the slackwater navigation of the Green and Big Barren Rivers from November 1, 1861, to June 30, 1865": *Held* (1) that the claim of the State is within said appropriation; (2) that it is not transmissible to the Court of Claims under section 1063 Rev. Stat.; (3) that the Secretary of War, to whom the amount was certified, is bound under section 191 Rev. Stat. to issue his requisition for payment thereof, without regard to his own view of the merits, unless there be "any facts" which in his judgment affect the correctness of the balance; in this case he is authorized, before signing the requisition, to submit the facts to the Comptroller; (4) upon such submission, the decision of the Comptroller is "final and conclusive." 626.

CLARK THREAD COMPANY CASE, RULING IN.

See CUSTOMS LAWS, 27.

CLEARANCE OF VESSELS.

See CUSTOMS LAWS, 19.

COAST SURVEY SERVICE, ALLOWANCES ON.

The additional allowances for subsistence provided for by section 4688 Rev. Stat. can legally be made to officers of the Army or

COAST SURVEY SERVICE, ALLOWANCES ON—Contin

Navy while employed on coast-survey service. Such allowances are not within the prohibition made by the final clause of section 4684 Rev. Stat. 283.

COLLECTOR OF CUSTOMS.

1. Where the office of collector of customs is in "abeyance," the duties thereof, whilst it remains in abeyance, may lawfully be performed by his special deputy, if there be one; if there be no such deputy, then by the naval officer, and so on, as provided in section 2625 Rev. Stat., in the order there named.
2. The authority to exercise the duties of the office in that case is, however, not imparted by section 2625, but by section 1769 Rev. Stat., within the terms of which latter section the above-named officers (in the order referred to) come, agreeably to the construction given. *Ibid.*

COMMISSIONER OF PATENTS.

See CONTRACT, 27, 31, 32.

COMMISSIONER OF THE GENERAL LAND OFFICE.

See LANDS, PUBLIC, 2.

COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

See DISTRICT OF COLUMBIA, 1, 2; ADVERTISEMENTS, 2.

COMPENSATION.

1. Under the provision in the act of March 3, 1875, chap. 131, which reads, "To enable the Secretary of the Treasury to pay Robert D. Lacey, late captain and quartermaster," a certain sum, "as the amount due him as arrearages of pay while on duty and prior to his final discharge," the settlement should take the course appropriate to an account accruing in the Treasury Department, and payment be made by the Secretary of the Treasury without a requisition from the Secretary of War. 45.
2. Where a special agent of the Post-Office Department, in receipt of a fixed compensation, performed services as a deputy marshal: *Held* (upon consideration of section 1765 Rev. Stat.) that he cannot be allowed, in respect of such services, anything beyond *actual expenses* incurred. 71.
3. Special agents employed by the Postmaster-General under section 4017 Rev. Stat., are entitled to an allowance for traveling and incidental expenses, within the limit there prescribed, only while they are actually employed in the service. 75.
4. The provision in section 4017 Rev. Stat., for traveling and incidental expenses of special agents of the Post-Office Department, while it limits the allowance to each agent to "a sum not exceeding five dollars a day," does not entitle the agent to have that amount allowed him where he has agreed with the Department to take a less sum per day for such expenses. 82.

COMPENSATION—Continued.

5. In ascertaining the storage fund out of which the customs officer is entitled to retain the maximum allowed, under section 5 of the act of March 3, 1841, chap. 35 (section 2647 Rev. Stat.), all storage fees received are to be computed, including those which have accrued from storage of merchandise in buildings owned by the Government. 117.
6. Upon examination of section 7, act of March 2, 1867, chap. 169 (sec. 3463 Rev. Stat.); act of July 20, 1868, chap. 176; act of March 3, 1869, chap. 121; act of April 10, 1869, chap. 15; act of July 19, 1870, chap. 251; act of March 3, 1871, chap. 113; sec. 1, act of May 8, 1872, chap. 140 (sec. 256 Rev. Stat.); sec. 39, act of June 6, 1872, chap. 315; sec. 1, act of March 3, 1873, chap. 226; sec. 1, act of June 19, 1874, chap. 328; and sec. 1, act of March 3, 1875, chap. 129: *Held* that the offer of "a reward for taxes recovered by reason of information furnished by the claimant," contained in Treasury Circulars No. 99, No. 99 revised, and No 99 second revision, was authorized by law. 133.
7. But no rate of compensation for information furnished being established by those circulars, the rate fixed by the Commissioner of Internal Revenue must in each separate case have the approval of the Secretary of the Treasury in order to warrant payment. *Ibid.*
8. An assistant United States attorney was appointed in 1874, at the request of the Postmaster-General, to aid in conducting a suit against a defaulting postmaster. By the terms of his appointment the assistant was to receive "a reasonable compensation, to be determined by the Post-Office Department." He claims a fixed amount as compensation, by virtue of an agreement made previous to the appointment: *Held* that whatever the previous agreement was, it has nothing to do with the matter of compensation for services under the appointment, which latter leaves the amount to the future determination of the Post-Office Department—an arrangement wherewith any previous contract for a specific fee is inconsistent. 189.
9. In determining the allowances which a district attorney should receive under section 827 Rev. Stat., as compensation for appearing by direction of the Secretary of the Treasury, or of the Solicitor of the Treasury, in suits against officers of the United States for acts done by them, or for the recovery of money received by them and paid into the Treasury, the Secretary of the Treasury may, in his discretion, properly consider what compensation such attorney otherwise annually receives from the Government, and limit the amount to be received by him for the services mentioned, including what he thus otherwise receives, to a sum not exceeding \$10,000 per annum. 277.
10. The Secretary of the Treasury cannot, under section 2634 Rev. Stat., give to officers whose compensation is fixed by law a compensation which shall be regulated by his own discretion. 286.

COMPENSATION—Continued.

11. A retired officer of the Army who performs the duties of a civil office which he may lawfully hold, under and by virtue of an appointment to such office, is entitled to draw his pay as a retired officer and also the salary provided for the civil office during the period of his incumbency of the latter office. 306.
12. In September, 1871, R., a paymaster in the Navy, was retired on furlough pay under section 23 of the act of August 3, 1861, chap. 42, and was thereupon allowed, under section 5 of the act of July 15, 1870, chap. 295, one-half of the highest pay of his grade. In May, 1876, he was transferred (under section 1594 Rev. Stat.) from the furlough to the retired pay list. By section 1593 Rev. Stat. officers retired on furlough pay are entitled to only one-half of leave of absence pay, and by section 1588 Rev. Stat. general provision is made fixing the pay of retired officers who do not fall under special provisions in that and other sections: *Held* that, after the Revised Statutes took effect, R. was entitled to receive only the pay provided by section 1593, and remained so entitled until the date of his transfer, when he became entitled to receive the pay provided by section 1588. 316.
13. Sections 1588, 1590, and 1593 Rev. Stat., which contain provisions both of a general and special character prescribing the compensation of retired naval officers, and embrace within their scope all such officers, whether of the line or staff, superseded all provisions in force at the adoption of the Revised Statutes by which that compensation was previously regulated, and those sections thereafter furnished the only law upon the subject. 317.
14. In the absence of constitutional restriction, the future compensation of a public officer may be altered at pleasure by the legislature during his incumbency, without violating any legal right vested in him by virtue of his appointment. *Ibid.*
15. Accordingly, the retirement of R., and allowance to him of compensation under the act of July 15, 1870, prior to the adoption of the Revised Statutes, did not give rise to a right in his favor, "accruing or accrued," which is protected by the saving provision of section 5597 Rev. Stat. *Ibid.*
16. Under section 829 Rev. Stat. the marshal for the district of Kentucky, in a case where proceedings are stayed after levy of an execution, and no moneys are collected thereon, is entitled to charge the half commissions allowed by the law of Kentucky to a sheriff in such a case. 346.
17. Where the marshal who levied the execution has received his half commissions, his successor will be entitled to no more than half commissions for completing the collection and paying over. 347.
18. Collectors of customs, whose compensation does not exceed \$3,000 a year, are entitled (under section 4672 Rev. Stat.), when acting as superintendents and disbursing agents for light-houses, to compensation for their services as such disbursing agents, the amount

COMPENSATION—Continued.

whereof is to be determined by the Secretary of the Treasury, but is not to exceed \$400 in any fiscal year. 348.

19. A special deputy (without compensation as such) constituted by the naval officer at the port of New York, under section 2632 Rev Stat., to perform the duties of the latter in cases of occasional and necessary absence or of sickness, may at the same time be appointed to a clerkship in the office of such naval officer, and be allowed, under section 2745 Rev. Stat., a compensation for his services *as clerk* greater in amount than that affixed by law to the permanent office of deputy naval officer at the same port, provided it do not exceed the rate usually paid for similar services. This case distinguished from the cases considered in the opinion of June 4, 1877. 355. (See APPOINTMENT, 8.)

20. Section 35 of the act of March 3, 1863, chap. 75, forbids the allowance of extra-duty pay to soldiers who are detailed for special service. 362.

21. The fees of marshals, district attorneys, and clerks of United States courts, in government suits, taxed and recovered as costs from the defendants therein, should be turned into the Treasury, and not paid over to the officers; they being entitled to payment (by force of section 856 Rev. Stat.) only on settling their accounts at the Treasury, and from the proper appropriation. 386.

22. So the fees of these officers, in cases of seizure, are not payable out of the proceeds of the property seized, except where the statute has so specially provided, but are payable only on settlement of their accounts at the Treasury, as in other cases. The exceptions to this rule are in cases of prize seizures (section 4639 Rev. Stat.), and seizures for forfeitures under the customs laws (section 3090 Rev. Stat.); also the per centum allowed to district attorneys in lieu of all costs and fees under section 825 Rev. Stat. 387.

23. Upon consideration of the provisions of sections 31 and 35 of the act of June 8, 1872, chap. 335: *Held* that the compensation of two special agents employed by the Postmaster-General for the free-delivery service can be paid out of the appropriation for that service. 417.

24. The provision in the act of August 15, 1876, chap. 289, making appropriations for the Indian Department for the year ending June 30, 1877, namely, "that amounts now due employees for year ending June 30, 1876, may be paid out of unexpended balance of the incidental fund of said year," considered in connection with section 3682 Rev. Stat., and *held* that under that provision amounts due for clerical or official services in the Indian service for the year ending June 30, 1876, may be paid out of the unexpended balance of the incidental fund of the Indian service for the same year. 434.

25. The term "employees," as used in the same provision, was meant to include all those who performed services in any capacity in the Indian service during the year ending June 30, 1876, whose em-

COMPENSATION—Continued.

ployment was authorized by law, and whose compensation remained unpaid at the date of the act of August 15, 1876. *Ibid.*

26. The Court of Commissioners of Alabama Claims has no authority to allow compensation to the marshal of the District of Columbia for his services in connection with that court. 533.

27. For any service of process under the act constituting said court, which comes within the description of any of the acts for which by section 829 Rev. Stat. marshals are allowed fees (*e. g.*, service of a warrant, or summons, or subpoena, under order of the court), the marshal is entitled to the fee in such section given. *Ibid.*

28. Fees thus earned and received by the marshal form a part of the emoluments of his office, and should be included in his emolument return. 534.

29. District attorneys are entitled, under section 825 Rev. Stat., to a commission upon the "tax" required to be paid by the purchasers of forfeited property sold in pursuance of section 3334 Rev. Stat. 566.

30. Such tax, however, is not within sections 828 (clause 17) and 829 (clause 6) of the Revised Statutes, and, therefore, clerks of courts and marshals are not entitled to commissions thereon. *Ibid.*

31. B., a retired naval officer, was dismissed from the Navy by order of the Executive on the 30th of December, 1865. In May, 1876, upon his application for trial by court-martial, made under section 12 of the act of March 3, 1865, chap. 79, a court was awarded, which, in June, 1876, pronounced him innocent of every charge and specification, and, the dismissal being thereby annulled, he was ordered (June 5, 1876) to be restored to the retired list. Between the date of his dismissal and the date of his restoration he had not demanded in writing from the Secretary of the Navy, as often as once in six months, a trial; but pay is claimed by him for this period: *Held* that the right of the claimant to pay is governed by section 2 of the act of June 22, 1874, chap. 392, under the provisions of which he is not entitled to more than "pay as on leave for six months" from date of dismissal. 569.

32. It was competent to Congress to modify, in the matter of pay, the effect of a restoration under the act of 1865. *Ibid.*

33. The act of 1842, chap. 183 (section 1785 Rev. Stat.), does not prohibit the minister resident at the Hawaiian Islands, who is allowed an annual salary, from receiving in addition thereto extra compensation for his services in supervising and taking testimony to be used in the Court of Commissioners of Alabama Claims, under the provisions of sections 4 and 11 of the act establishing that court. 608.

34. Where the service is one required by law, but not of any particular official, and compensation therefor is fixed by competent authority and is appropriated, an officer who under due authorization performs the service is entitled to the compensation. *Ibid.*

COMPENSATION FOR CARRYING THE MAIL.

See APPROPRIATIONS, 4; CLAIMS, 16; CONTRACT, 33, 34; POSTAL LAWS, 2, 3, 4, 5, 7, 11, 12, 14.

CONSTRUCTIVE SERVICE.

See NAVY, 3, 4.

CONTRACT.

1. Where proposals were received by the Chief Signal Officer from different parties to supply certain manifold forms, at rates greatly varying in amount, and that officer, before awarding the contract, was notified by the party making the highest bid that the manufacture of the manifold forms is covered by a patent owned by himself, and that no other bidder could supply them without infringing his patent—some of the other bidders, however, denying the validity of the patent, and claiming that they are not thereby precluded from supplying the article: *Advised* that, under the circumstances presented, the contract should not be given to the lowest or any other bidder, if the article to be supplied is covered by the terms of a patent, unless the Chief Signal Officer is satisfied that the bidder has authority from the patentee to manufacture and sell it. 26.
2. An advertisement for proposals (under section 3709 Rev. Stat.) for furnishing the Post-Office Department with postage-stamps may, in the discretion of the Postmaster-General, be limited to "steel-plate engravers and plate printers;" the purpose of the limitation being to confine the submission of proposals to such persons only as can satisfactorily furnish the articles needed. 226.
3. Where the advertisement requires the proposals to be made on blank forms furnished by the Department, the omission or erasure of immaterial words in the proposal of a bidder does not affect the validity of his bid. *Ibid.*
4. An award of contract, by the issuance of an order of the Postmaster-General in the usual way and its transmittal to the bidder, thus indicating the acceptance of his proposal, is sufficient, and, when received by the latter, the award thus made is beyond recall, and the agreement is complete and binding upon the Government. *Ibid.*
5. It makes no difference in such case that a more formal contract was contemplated to be entered into, but has not been executed by the bidder, if the failure be not attributable to his default. *Ibid.*
- 6.* By act of March 3, 1871, chap. 113, sec. 2, Congress appropriated \$500,000 for the construction, under the direction of the Secretary of State, of the south wing of a building designed for the accommodation of the State, War, and Navy Departments. Appropriations were subsequently made for continuing and completing that wing, and also for the construction of other wings of the same building, the expenditure of the later of these appropriations being placed under the direction of the Secretary of War. On the 16th of November, 1871, a contract, with the approval of

CONTRACT—Continued.

the Secretary of State, was made with O., by which the latter was to furnish from certain quarries and deliver at the site of the building all the granite required for the south wing, and also all the granite which might be required for the entire building or any additional part thereof, when the construction of the same should be authorized. The contractor, O., was also to furnish all the labor, tools, and materials necessary to cut, dress, and box at the quarries all the granite; in consideration of which he was to be paid the full cost of said labor, tools, and materials, together with the insurance on the granite, increased by 15 per centum of such cost: *Held* that the contract is not binding upon the United States as to the appropriations made subsequently to the act of March 3, 1871, except so far as it has been adopted and acted upon by those to whom the expenditure of such appropriations was confided, and that the present Secretary of War is not bound to adopt and carry it out as to appropriations intrusted to him. 235.

7. To be "authorized by law," within the meaning of section 10 of the act of March 2, 1861, chap. 84 (section 3732 Rev. Stat.), a contract must appear to have been made either in pursuance of express authority given by statute, or of authority necessarily inferable from some duty imposed upon, or from some power given to, the person assuming to contract on behalf of the Government. 236.
8. Authority to contract for the completion of an entire structure, the plan of which has been determined on, cannot be inferred from the mere fact that an appropriation of a certain sum to be expended on the structure has been made. Hence a contract, though it might be good to the extent of such appropriation, could not be made to affix itself to future appropriations and control their expenditure. A contract of this character would be in violation of the spirit of section 3, act of July 25, 1868, chap. 233 (section 3733 Rev. Stat.), if not of its express terms. *Ibid.*
9. The aforesaid contract with O., as regards the cutting and dressing of the stone, is not a contract for "personal services," within section 10 of the act of March 2, 1861, chap. 84. *Ibid.*
10. *Quere*, whether the provision in that section for the advertisement of purchases and contracts is directory merely, or whether the failure to make such advertisement avoids the contract. *Ibid.*
11. In view of the action of Congress since the date of the contract with O. and other circumstances (though not amounting to a ratification of the contract): *Advised* that, whatever may have been the irregularity in its inception by reason of insufficient advertisement, the Secretary of War is justified in proceeding with the contract as it now exists to the extent of the appropriations in his hands, or as it may be modified, should he deem it proper to do so. *Ibid.*

CONTRACT—Continued.

12. O. having given a power of attorney to S., coupled with an interest in the performance of the contract, by which power S. was to sign and receipt for all moneys due under the contract: *Held* that this was a transfer of the contract within section 14 of the act of July 17, 1832, chap. 200; yet that, although the Government may avail itself of such transfer to annul the contract under the provisions of that section, it is not compelled to do so. *Ibid.*
13. The contract made with C. P. Dixon, October 10, 1873, for granite, and for cutting and dressing the same, for the Philadelphia post-office building, is not obligatory upon the United States so far as it now remains executory and unperformed, and the Secretary of the Treasury need not proceed with it under the appropriations in his hands, unless he deems it for the interests of the Government to do so. 253.
14. Advertisement for proposals having been made for the rough stone from the quarry, but not for the cutting and dressing of it, before letting the said contract: *Held* that the cutting and dressing were not within the exception of "personal services" in section 3709 Rev. Stat., and that such advertisement did not meet the requirements of said section as regards the contract actually entered into. *Ibid.*
15. The "public exigency" contemplated by that section is one of time only. *Ibid.*
16. The provision in same section requiring articles or services to be obtained by "open purchase or contract at the place and in the manner in which such articles are usually bought and sold, or such services engaged between individuals," does not apply to a contractor with the United States. 254.
17. The proposed modification of one of the contracts for furnishing and dressing stone, known as the "15 per cent. contracts," may be made, and the performance of the contract as modified proceeded with, without further advertisement, if the modification would render the contract less onerous upon the United States than it is in the form in which it was originally made. 270.
18. In June, 1876, R. entered into a contract with the Quartermaster's Department for the fiscal year ending June 30, 1877. He was afterwards (in the fall of 1876) elected a Delegate to the Forty-fifth Congress. That Congress not having as yet (in May, 1877) met, and R. not being as yet a member of that body: *Held* that the provisions of sections 3739 and 3741 Rev. Stat. have no application to him. Whether, if the Congress should meet, and R. should be sworn in as a Delegate during the continuance of his contract, the latter would thereby be annulled, is not considered. 280.
19. In 1868, A. and V. made a contract with the Osage tribe of Indians, by which they were to receive one-half of what should be secured to the tribe by reason of their services in preventing the ratification of a treaty affecting lands of the tribe. After the ratifica-

CONTRACT—Continued.

tion had been defeated that contract was relinquished, and in 1873 a new one was made, by which the sum of \$230,000 was agreed to be paid A. and V. This contract having been submitted by these parties to the Commissioner of Indian Affairs and the Secretary of the Interior "for payment of the whole amount thereof, or for so much as they might deem just and equitable in the premises," was approved by the Commissioner and Secretary for the sum of \$50,000, which was accordingly paid. Subsequently, on application of A. and V. to the Indian Department to reopen the case, the Secretary of the Interior refused to make any further allowance. On petition of the governor and council of the Osages in behalf of A. and V., asking the President to direct a further allowance of the claim: *Advised* that the petition cannot with justice or propriety be granted by the President, (1) because his power to order the payment is (for reasons stated in the opinion) of doubtful legality; (2) because the same claim was submitted by the parties to the Interior Department and an award made thereon, which has been paid; (3) because at a subsequent time it was reopened and the same decision reached; (4) the matter is now *res adjudicata*. 350.

20. A contractor with the War Department agreed to complete a certain work within a definite time, and in default thereof to forfeit \$50 a day during each and every day's delay thereafter in its completion; the amounts thus forfeited "to be deducted from the amount which may be due . . . on the final completion of the work, as liquidated damages." The work was not completed by the time fixed, but it was faithfully performed, agreeably to the specifications of the contract, and the Government sustained no damage whatsoever in consequence of the delay: *Held* that the *per diem* forfeiture, according to the intention of the parties here (which is to be ascertained from a view of the whole contract, the use of the words "liquidated damages" not being, in itself, conclusive of such intention), must be regarded as a penalty, the object of which was to secure the Government against actual loss or damage arising from delay in the completion of the work. 418.
21. The work having been completed, and no damage sustained by the delay, the conditions necessary to warrant the exaction of the penalty do not exist, and the Department is accordingly at liberty to release the contractor therefrom. *Ibid.*
22. The Secretary of the Navy has not power, under the circumstances stated, to release a contractor from his undertaking to furnish (among other enumerated articles) "a saw, futtock, for boat-builders' use, Knowlton's patent," to the several navy-yards. 481.
23. Where a person contracted with the United States to remove certain rock from the harbor of San Francisco, and whilst engaged in the work was enjoined by a court of the State from receiving an installment of pay due thereon, whereby he was hindered

CONTRACT—Continued.

from going on with the contract : *Held* that process issued under the authority of a State cannot legally obstruct, directly or indirectly, the operations of the United States Government; yet *advised*, under the circumstances here presented, that the contract be declared forfeited. 524.

24. In July, 1872, M. contracted to furnish all the dimension stone required for the custom-house building at Chicago, Ill., to be delivered at its site, and to be "of uniform color, free from flaws, stains, or discoloring matter." By a subsequent contract he agreed to cut such stone in such manner and at such place as might be required by the agent of the United States: *Held* (1) that the two contracts are not merged into one by the fact that M. is contractor in each; (2) that his obligations under the first contract are not affected by his engagement under the second, nor are his rights under the latter affected by the fact that he had furnished the stone upon which the work was to be done. 531.

25. The undertaking of M. in the first contract that the stone should be free from discoloring matter, stains, &c. (it being understood that such stone needed to be cut before being used), was in effect an undertaking that *when cut* the stone should be free from discoloring matter, stains, &c. *Ibid.*

26. Under the second contract he fulfills his obligation if he skillfully cuts the stone furnished by the United States, though it has only been provisionally accepted by the latter, and is not responsible for the stock. *Ibid.*

27. In July, 1872, the Commissioner of Patents, without previous advertisement, contracted with P. to furnish certain photolithographic copies of patent drawings of date anterior to July 1, 1870, and of such other dates as the Commissioner might designate, the contract (which was subsequently modified) to run until July 1, 1875. Appropriations were made for continuing the work in 1873, 1874, and 1875. On the 27th of March, 1875, the Commissioner (without advertising) and P. extended the contract so as to cover so much of the appropriation of \$100,000 made by the act of March 3, 1875, chap. 129, for producing copies of drawings of current and back issues, as should be used for producing such copies by photolithographing. P. thereupon made, in good faith, large expenditures to enable him to execute the contract thus extended. The Joint Congressional Committee on Printing were consulted with reference to the original contract and also the extension, and approved both: *Held* that the contract of March 27, 1875 (extension of original contract), having been made without due advertisement, is not valid and binding upon the Government; and that the fact that the contractor made, in good faith, expenditures to enable him to perform the same does not give it validity. 538.

28. An officer who, in giving out a contract, has failed to comply with

CONTRACT—Continued.

the statutory provision requiring advertisement previous to letting the contract, cannot, by permitting performance thereunder to proceed to any extent, make such contract obligatory upon the Government. *Ibid.*

29. Opinion of Attorney-General Bates (10 Opin., 416) that, although a statute containing that requirement has been disregarded, yet if the contract has been partially performed it cannot be deemed void, but must be executed according to its terms, disapproved. The present case, however, distinguished from the one there considered. 539.

30. Sections 490, 491, and 492 Rev. Stat. do not apply to and regulate the production of back issues described in the contract of July, 1872, as of date anterior to July 1, 1870. *Ibid.*

31. The authority to make contracts for the work provided for by the appropriation of March 3, 1875, is vested in the Commissioner of Patents. *Ibid.*

32. The Committee on Printing have, by section 492 Rev. Stat., no power to waive an advertisement except in case of an exigency of the public service. Such power is not implied in their power to prescribe rules for the action of the Commissioner of Patents. *Ibid.*

33. Where the Postmaster-General was authorized by statute to advertise for proposals to perform certain ocean mail service in steamships of not less than 3,000 tons burden; and after due advertisement, a steamship company proposed to perform the service at a certain price in steamships of from 3,500 to 4,000 tons burden, which offer was accepted and a contract made accordingly: *Held* that the Postmaster-General cannot accept and pay, under such contract, for service done in steamships of less burden than that stipulated, although they are over 3,000 tons burden. 556.

34. An American steamship company having contracted to transport the United States mail between Shanghai and Yokohama, sublet the contract to a Japanese company, the latter company chartering from the former an American vessel, officered by citizens of the United States, and carrying the United States flag, to perform the service, with an agreement to purchase the vessel at the close of the contract term. Under this arrangement the mail was transported for a quarter: *Held* that payment for this service should be made according to the terms of the original contract. 55e.

35. Proposals for carrying the mail on route No. 43132 were made by G. and accepted, but were subsequently suspended, and contract was made with O. for the full term. Suit against the United States was brought by G. in the Court of Claims, claiming damages for breach of contract, which resulted in a judgment in his favor. Thereupon G. filed an application in the Post-Office Department that he be permitted to perform the service on said route according to his proposal for the balance of the contract

CONTRACT—Continued.

term: *Advised* that, the rights of G. under his proposal having been ascertained by the judgment recovered, he has no legal right to the service; but that, as the contract with O. for the full contract term was irregular and unfounded in law, there is no legal objection to terminating the service with the latter, and accepting a contract with the former in accordance with his application, should the Postmaster-General be of opinion that the public interests will be served thereby. 616.

36. Stipulations in Indian treaties existing prior to June 20, 1874, for the payment of annuities, &c., are contracts within the meaning of the second *proviso* of the fifth section of the act of June 20, 1874, chap. 328, and their fulfillment is not to be prevented by any operation given to that section. 632.

37. Under the act of August 14, 1876, chap. 267, advertisement was made for proposals to build certain locks on the Muscle Shoals Canal. Proposals having been received from several bidders in response thereto, these were opened May 15, 1877, when it appeared that S. was the lowest bidder. Afterwards, on the same day, a telegram was received from him withdrawing his bid; and again, on the 18th of June, his bid was withdrawn by letter. On the 27th of July, S. was formally notified that the contract for building the locks had been awarded to him, but he, by letter dated July 30, declined to enter into it: *Held* that S. had a *locus penitentiae* until acceptance of his bid, during which period he was at liberty to withdraw it; and that, the withdrawal of his bid having taken place prior to its acceptance, neither he nor his sureties are liable upon the guarantee which accompanied the bid. Section 3944 Rev. Stat. has no application to this case. *Held*, further, that the other bidders are not released, and that the contract may be awarded to the one whose bid is lowest. 648.

CONTRACTS FOR ARMY AND NAVY SUPPLIES.

1. The exception contained in section 3732 Rev. Stat. in favor of contracts or purchases in the War and Navy Departments for clothing, subsistence, forage, fuel, &c., withdraws such contracts or purchases from the operation of the prohibition in section 3679 Rev. Stat. 124.

2. *Held*, accordingly, that contracts and purchases in those Departments for clothing, subsistence, &c., may be made, though there is no appropriation adequate to their fulfillment, provided such contracts and purchases do not exceed the necessities of the current year. *Ibid.*

COPIES OF PAPERS.

An application for copies of papers on file in a Department, to be used by the applicant in a suit promoted by him under section 3491 Rev. Stat., stands upon the same footing with a like application by a plaintiff in any other private suit. 562.

See DEPARTMENT, 5.

CORPORATION ENGAGED IN DISTILLING.

See INTERNAL REVENUE, 6.

COUNSEL, COMPENSATION OF.

See CLAIMS, 12.

COUPONS DEFACED OR DESTROYED.

See BONDS OF THE UNITED STATES, 3, 4.

COURT-MARTIAL.

1. It is not necessary that the President should attach his sign manual to the approval of a sentence rendered by a court-martial in time of peace, cashiering a commissioned officer, in order to make the sentence effectual. It is sufficient, for this purpose, if his approval of the sentence be signified through and attested by the Secretary of War in a statement signed by the latter. 290.
2. Paragraph 896 of the regulations of the Army does not apply to proceedings of courts-martial which require the decision of the President. It is applicable only to those proceedings which may be confirmed by the officer who ordered the court to assemble or the commanding officer for the time being, as the case may be. *Ibid.*
3. The action of the President in matters relating to the Army which require his approval and direction may, in general, be signified through and authenticated by the head of the Department of War. Where the latter acts in such matters, he acts, in contemplation of law, under the direction of the President, and is to be regarded as the mere organ of the Executive will. *Ibid.*
4. This principle has been long and frequently acted upon in making known the will or determination of the President in cases of sentences of courts-martial required to be laid before him for confirmation or disapproval. *Ibid.*
5. A statement made and signed by the Secretary of War, announcing the approval by the President of a court-martial sentence, is a sufficient authentication of the act of the President, without an express averment therein that it is made by direction of the President; the presumption being always that such direction was given. *Ibid.*
6. An act of the President remitting part of a court-martial sentence may be authenticated in the same way in which his act confirming such sentence can be authenticated. Where partial remission is made at the time of confirmation, the two acts are, in practice, signified and attested together in the same way. 291.
7. When the sentence of a court-martial, lawfully confirmed, has been executed, the proceedings in the case are no longer subject to review by the President. *Ibid.*
8. Concerning the power of the President to appoint general courts-martial, see *Note*, p. 297.
9. Where the accused was tried and convicted by a general court-martial on three distinct charges, one of which had been preferred

COURT-MARTIAL—Continued.

by a member of the court, who testified as a witness in support of the same and afterwards sat upon the trial, no objection being made thereto by the accused, and the sentence of the court was duly confirmed: *Held* that the fact that a member of the court sat upon the trial after testifying did not render its proceedings invalid or make its sentence void and inoperative. 432.

10. The objection, where it is not distinctly waived by the accused, goes to the *propriety* of the member sitting after he had testified, not to his *legal capacity* thus to sit; and, if seasonably made, it would afford good ground for disapproval of the proceedings by the reviewing officer, though not of itself sufficient to invalidate them. *Ibid.*

11. Civil engineers in the Navy are subject to the jurisdiction of naval courts-martial. 597.

COURT OF COMMISSIONERS OF ALABAMA CLAIMS.

1. The Court of Commissioners of Alabama Claims has no authority to *allow* compensation to the marshal of the District of Columbia for his services in connection with that court. 533.

2. For any service of process under the act constituting said court, which comes within the description of any of the acts for which by section 829 Rev. Stat. marshals are allowed fees (*e. g.*, service of a warrant, or summons, or subpoena, under order of the court), the marshal is entitled to the fee in such section given. *Ibid.*

3. Fees thus earned and received by the marshal form a part of the emoluments of his office, and should be included in his emolument return. 534.

4. The clerk of the Court of Commissioners of Alabama Claims, in his capacity as disbursing agent, paid to the marshal of the District of Columbia, for his services, a certain amount of money, under an order of that court requiring him to pay to the marshal, monthly, a salary of \$3,200 per annum: *Held* (reaffirming opinion of February 1, 1876) that the order of the court was no warrant for the payment as salary; *held*, further, that it was no warrant for the payment as an amount advanced to the marshal, to be by him accounted for at the Treasury. 567.

CURRENCY.

The German-American Savings Bank of Washington, D. C., incorporated under a law of Congress relating to the District of Columbia, and having a capital of \$126,000, is, by virtue of section 6 of the act of June 30, 1876, chap. 156, required to keep on hand (under section 5191 Rev. Stat.) a reserve of 25 per cent. of its deposits, and is entitled (under sections 5157-5189 Rev. Stat.) to receive circulating notes. 605.

CUSTOMS LAWS.

1. Damages received during the voyage between the foreign port and the port of arrival, by merchandise entered at the latter port for

CUSTOMS LAWS—Continued.

"immediate transportation" to an interior port of destination under section 2990 Revised Statutes, should be ascertained at the port of destination. 7.

2. In the case of merchandise so entered, the phrase "port where such merchandise has been landed," in section 2927 Revised Statutes, is construed to signify the port of destination; and the words in same section, "after the landing of such merchandise," are construed to mean after the landing at the port of destination. Accordingly, the "ten days," within which proof to ascertain the damage must be lodged in the custom-house, are to be computed from the landing of the merchandise at that port. *Ibid.*
3. Merchandise which arrived at New York from a foreign port prior to March 3, 1875, but which arrived at an interior port under an immediate transportation bond without appraisement after that date, is by virtue of section 5 of the act of March 3, 1875, chapter 127, exempt from liability to the increased duties imposed by that act. *Ibid.*
4. In such case the merchandise is to be regarded, under that section, the same as if the ship on which it reached the port of first arrival had continued her voyage to the port of final destination. *Ibid.*
5. Section 2504, Rev. Stat., schedule K, re-enacts a provision of the act of March 2, 1861, chap. 62, imposing a certain duty on "timber hewn," while in the same schedule and section a provision of the act of June 6, 1872, chap. 315, is re-enacted, imposing a different duty on "timber squared or sided": *Held* that, as regards squared or sided timber hewn, the latter provision superseded the former, and that this effect remains, notwithstanding the adoption of both in the Revised Statutes; but with respect to unsquared timber hewn, the provision taken from the act of 1861 is still in force. Opinion of June 19, 1875, referred to. 32.
6. Timber hewn by the natural taper of the tree, if not in the commercial sense squared, is "timber hewn" within said schedule K. *Ibid.*
7. Velvet and ready-made clothing in which silk is the component material of chief value, but containing cotton, flax, wool, or worsted to the extent of 25 per cent. or over in value, are dutiable at 60 per cent. *ad valorem*. 51.
8. Provisions of schedule H in section 2504 Revised Statutes, and of section 1 in the act of February 2, 1875, chap. 36, considered and construed with reference to the duty upon the articles above described. *Ibid.*
9. Carpet wools valued at 12 cents or less per pound, exclusive of charges at the last port of shipment, are dutiable under section 2504 Rev. Stat., schedule L, at the rate of 3 cents per pound. 72.
10. The subject of the duty on carpet wools re-examined, and the opinion of February 26, 1876—namely, that under the law, as it is contained in section 2504 Rev. Stat., with which is to be con-

CUSTOMS LAWS—Continued.

sidered the proviso under section 2908 Rev. Stat.), carpet wools, whose value at the port of exportation, exclusive of the charges there, is not above 12 cents per pound, pay no higher rate of duty than 3 cents per pound—reaffirmed. 76.

11. The phrase "charges in such port," occurring in schedule L, of section 2504 Rev. Stat., does not include export duty. (*Contra*, opinion of October 23, 1876, on re-examination of the subject.) 105. (See *infra*, par. 20.)
12. Carriagess, previously in use by the owner, are not "personal effects" within the meaning of section 2505 Rev. Stat., and are not entitled to exemption from duty by force of that section. 113.
13. Rebate of duties, under section 2513 Rev. Stat., applies only to vessels designed to be documented for and employed in foreign trade or in trade between the Atlantic and Pacific ports of the United States. 114.
14. Opinions of May 27 and July 6, 1874 (14 Opin., 653, 672), touching the meaning and effect of the twentieth section of the act of June 30, 1864, chap. 171, reaffirmed. 121.
15. Section 21 of the act of June 22, 1874, chap. 391, is intended to limit the time within which errors in the liquidation and payment of duties may be corrected. It has no application to claims under the provisions of section 20 of said act of June 30, 1864, for refund of additional duties exacted and paid upon importations made on the 29th and 30th of April, 1864. *Ibid.*
16. Carriages are not "household effects" within the meaning of the paragraph in section 2505 Revised Statutes, which reads, "Books, household effects, or libraries, or parts of libraries in use of persons," &c., and exemption from duty cannot be claimed for them thereunder. 125.
17. Section 2994 Rev. Stat. has no application to the transportation of *appraised* merchandise. The word "merchandise," at the commencement thereof, is limited in its signification to such merchandise as may, under the four next preceding sections (2900 to 2993 inclusive), be entered for immediate transportation to the port of final destination, without appraisement and liquidation of duties at the port of original importation. 128.
18. In order to be entitled to drawback on fire-arms, under sections 3019 and 3020 Rev. Stat., the statute does not require that they shall have been made entirely of imported material, excepting only their stocks. It is sufficient if imported material has been used in their manufacture exceeding in value one-half of the value of the whole of whatever kinds of material have been so used, including their stocks, the latter being made of wood of American growth. 147.
19. Section 2793 Rev. Stat. applies only to vessels engaged in the foreign and coasting trade which depart from or arrive at places established by law as ports wherefrom and whereat such vessels may be cleared and entered by the customs officials. 166.

CUSTOMS LAWS—Continued.

20. Subject of the opinion of May 18, 1876 (viz, as to whether an export duty levied at the foreign port of shipment is or is not to be excluded in ascertaining the dutiable value of certain wools provided for in schedule L of section 2504 Rev. Stat.), re-examined; and *held* that such duty is one of the "charges in such port" within the meaning of the provisions of that schedule, and should be excluded in determining the dutiable value of the wools—overruling said opinion. 172.
21. Paintings on glass, which rank as works of art, are subject to a duty of 10 per centum *ad valorem* under section 2504 Rev. Stat., schedule M, as "paintings * * * not otherwise provided for." 200.
22. Such paintings distinguished from paintings on glass which are the products of manufacture or handicraft. The latter only are dutiable under the provisions in schedule B of that section, for "paintings on glass or glasses * * * not otherwise provided for." *Ibid.*
23. The additional duty of 20 per cent. *ad valorem* provided by section 2900 Rev. Stat. does not accrue until, by an appraisement under that section or by a reappraisement under section 2929 Rev. Stat., it is found that the value of the goods exceeded by 10 per cent. or more their invoiced or entered value. 335.
24. An American vessel employed in the foreign trade, for the repair of which articles of foreign production have been withdrawn from bonded warehouse free of duty, may engage in the coastwise trade not more than two months in any one year without payment of duties on such articles. Section 2514 Rev. Stat. is to be construed with section 2513 Rev. Stat., as if it formed a part thereof. 369.
25. Under section 2504 Rev. Stat., which imposes a duty of one cent per pound on "chicory-root, ground or unground," and five cents per pound on "chicory-root, burnt or prepared": *Held* that "chicory-root, ground" (though burnt previous to being ground), is liable to a duty of one cent a pound. 491.
26. By act of March 2, 1861, section 20, a duty of 20 per centum *ad valorem* was laid on "sawed timber"; and by act of June 6, 1872, section 1, a certain duty per thousand feet was imposed on "sawed lumber." The Treasury Department construed the latter provision to supersede the former. Both provisions were, however, subsequently re-enacted in section 2504 Rev. Stat.: *Held* that the construction of the Treasury Department was correct, and that the mere bringing forward into the Revised Statutes of the two provisions has not changed the previous state of the law. 492.
27. The ruling of the Secretary of the Treasury in 1876 in the case of the Clark Thread Company—namely, that if a "manufacture of steel" is known to be an integral and important constituent of a machine which when set up will comprise a "manufacture of iron" imported at the same time, both manufactures must be assessed as *steel*, no matter that by distinct invoices, packages,

CUSTOMS LAWS—Continued.

and values they have been so arranged as to be readily separable by officials—is not warranted by the provisions of the statute (section 2504 Rev. Stat., schedule E), and ought not to govern similar cases pending. 629.

22. The regulation issued by the Secretary of the Treasury prior to the year 1875, commencing with the words, "On all articles manufactured from two or more materials," &c., is in such cases reasonable, and should be applied. *Ibid.*

29. The amount received by the customs officers on the northern frontier for each blank manifest or clearance sold under section 2648 Rev. Stat. is a fee intended for the use of the officer, and does not come within the provision of section 3617 Rev. Stat., requiring "the gross sums of all moneys received, from whatever source, for the use of the United States," &c., to be paid into the Treasury. 654.

30. The additional duty of 20 per centum *ad valorem*, which is imposed by section 2900 Rev. Stat. by way of a penalty for undervaluations, can have no application to an undervaluation of brandy where the brandy, being under first proof, is by appraisement worth not above four dollars per gallon. 656.

DAMAGES.

See CLAIMS, 20.

DAMAGES ON DUTIABLE MERCHANDISE.

See CUSTOMS LAWS, 1, 2.

DELEGATE TO CONGRESS ELECT.

See CONTRACT, 18.

DEPARTMENT.

1. Only those bureaus and offices can be deemed bureaus or offices in any of the Executive Departments which are constituted such by the law organizing the Department; the latter, with its bureaus or offices, being in contemplation of the law an establishment distinct from the branches of the public service and the officers thereof which are under its supervision. 262.
2. Recommendations for office are not papers or documents which are required to be kept by the Departments in which they are deposited. They are placed on file therein for the convenience of applicants for office, who are allowed to withdraw them whenever they desire to do so. 342.
3. Such applicants can properly be permitted to see objections that have been filed against themselves (subject to the limitation, however, that the permission should only be given where the communication is not in its nature privileged), in order that they may, if possible, answer or remove them. But the privilege should not be extended further; as all is done that justice requires when a party is permitted to see any objections filed against himself. *Ibid.*

DEPARTMENT—Continued.

4. Accordingly, where application was made to the President, on behalf of a newspaper, for permission to examine the files of the Executive Departments with a view to ascertain what persons have been recommended for office by a certain Senator and Representative in Congress (the purpose being to establish from such examination the fact that improper persons have been thus recommended by the Senator and Representative named): *Advised* that the Department files ought not to be submitted to a search of that character. 343.
5. Nor should copies of recommendations and papers of this nature be furnished in any case, unless the applicant appears himself to have been directly affected by the writing of which a copy is applied for. *Ibid.*
6. An application for copies of papers on file in a Department, to be used by the applicant in a suit promoted by him under section 3491 Rev. Stat., stands upon the same footing with a like application by a plaintiff in any other private suit. 562.
See OFFICIAL ENVELOPE, 1, 2, 4, 5.

DEPOSIT OF PUBLIC MONEYS.

See SECRETARY OF THE TREASURY, 9.

DESERTION.

1. The two years' limitation provided by the one hundred and third article of war is applicable to the offense of desertion.
2. The limitation begins to run from the commission of the offense, excepting in a case where, by reason of "manifest impediment," the accused is not amenable to justice within two years from that time. In such case it begins to run from the removal of the impediment.
3. Desertion is a *continuing* offense—an offense which may endure (*i. e.*, be continually committed) from day to day after the period of its completion. But the continuing commission thereof is limited by the obligation to serve imposed upon the deserter by his engagement. When that obligation ceases to exist, the commission of the offense necessarily terminates, and the limitation then begins to run in cases not excepted.
4. Enlistments are required to be "for the term of five years." By his engagement the soldier is bound for a *specific term* of service, the last day of which is as much fixed by the contract as the first. With the last day of the term his engagement expires, and with the expiration of his engagement the obligation to serve, thereby imposed, is at an end. This results, notwithstanding there has been an infraction of the contract by desertion or otherwise, unless the soldier, before the term is up, consents to an extension.
5. The provision in the forty-eighth article of war, that a deserter "shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment," is a penal provision. It does not, by its

DESERTION—Continued.

own force simply, work a prolongation of the term originally contracted. It operates only after a conviction.

6. Held accordingly, in case of desertion by an enlisted soldier, that (excepting where the offender has previously surrendered himself or been apprehended, or where, by reason of manifest impediment, he is not amenable to justice) the limitation begins to run from the last day of the term for which he enlisted.
7. Absence without leave is not *per se* sufficient to prevent the limitation from running.

DIRECT-TAX LAW.

1. The *proviso* in section 6 of the act of March 3, 1865, chap. 87, requiring bills for expenses incident to proceedings of the direct-tax commissioners to be submitted to and approved by the Secretary of the Treasury before payment, does not withhold from the action of the Secretary cases in which his approval is asked after such bills have been paid by the commissioners. 106.
2. The authority exercised by the Secretary under section 14 of the same act, in fixing the rates of compensation to be allowed the clerks, &c., there mentioned, is distinct from that exercisable under section 6, and does not amount to an *approval* of payments to such persons within the meaning of the latter section. *Ibid.*

DISBURSING OFFICERS.

1. Under section 3620 Rev. Stat., as amended by act of February 27, 1877, chap. 69, the Treasurers and Assistant Treasurers of the United States may be authorized to pay the checks of disbursing officers, where the same are drawn in favor of the persons to whom payment is made, but are payable to order or bearer. Whether such checks shall be made payable only to the persons entitled to payment, or to bearer, or to order, is a matter to be regulated entirely by the discretion of the Secretary of the Treasury. 288.
2. It is competent to the Secretary of the Treasury, under section 3620 Rev. Stat., as amended by the act of February 27, 1877, chap. 69, to permit disbursing officers to draw, and the assistant treasurers and public depositaries to pay, checks made payable to themselves or bearer or order, for such sums as may be necessary to make payments of small amounts, to make payments at a distance from a depositary, or to make payments of fixed salaries due at a certain period (as authorized by Treasury regulations of August 24, 1876), provided such checks bear indorsed thereon the names of the persons to whom the sums are to be paid, or the claim upon which they are to be paid, or are accompanied by a list or schedule, made a part of the check, containing the same information. 303.
3. Under section 5 of the act of June 20, 1874, chap. 328, it is the duty of disbursing officers, with whom funds have been placed for disbursement, when the time arrives at which unexpended balances

DISBURSING OFFICERS—Continued.

of the appropriations from which such funds were drawn lapse, to repay the funds remaining in their hands, in order that they may be carried to the surplus fund and covered into the Treasury. 357.

4. Where, previous to that time, these officers have issued certificates by which claims upon such appropriations have been definitely ascertained, and payment thereof has not actually been made before that time, such claims may thereafter be paid by them out of the proper funds remaining in their hands. *Ibid.*
5. For what period and to what amount such officers should be allowed to retain in their hands funds for that purpose, after the date when unexpended balances of the appropriation lapse, is a matter of administration, falling within the province of the Secretary of the Treasury to regulate. 358.

DISCHARGE FROM MILITARY SERVICE.

See ARMY, 24.

DISMISSAL OF OFFICER.

See NAVY, 9, 10; PRESIDENT, 13, 14.

DISTILLER.

See INTERNAL REVENUE, 14.

DISTRICT ATTORNEY.

1. Section 15 of the act of June 22, 1874, chap. 391, modifies section 838 Rev. Stat., in so far as to require the district attorney to commence proceedings in all cases covered by the latter section, excepting *only* where the case cannot, in his judgment, be "sustained." 522.
2. It is the duty of the district attorney, however, to report the facts to the Secretary of the Treasury in every case (as well where proceedings are instituted by him as where they are not), to the end that the Secretary may determine what "the ends of public justice require" in relation thereto. 523.

See COMPENSATION, 9, 21, 22.

DISTRICT OF COLUMBIA.

1. The Board of Commissioners of the District of Columbia, under its general executive and administrative authority over the affairs of the District, and its general supervision and direction over the Engineer officer detailed to perform certain duties relating to the "repair and improvement of all streets, avenues, alleys, sewers, roads, and bridges of the District," has power to direct the discharge of the two assistants whom that officer is authorized to appoint, whenever, in its judgment, circumstances make it expedient to determine their employment. The Engineer officer is not authorized to retain these assistants after the board has directed their discharge. 216.

DISTRICT OF COLUMBIA—Continued.

2. Section 5 of the act of July 12, 1876, chap. 680, providing for the publication of lists of property in arrears for taxes, does not authorize the Commissioners of the District of Columbia, in determining the "lowest bidder" for making such publication, to have regard to the circulation of each newspaper bidding. It is sufficient if the paper is a *bona fide* newspaper, and there is nothing as to the amount of publicity which the notice may receive that will defeat the purpose of the legislature in requiring the advertisement. 324.
3. The advertisement of the list of property in arrears for taxes, under section 5 of the act of July 12, 1876, chap. 180, would not be in conformity to the laws in force in the District of Columbia if made in a newspaper published on Sunday. 326.
4. The provisions of that act must be construed in connection with the other statute law of the District, and they are not to be taken to repeal any part of the latter unless where necessarily repugnant thereto. *Ibid.*

DISTRICT OF COLUMBIA 3.65 BONDS.

The faith of the United States is, by section 7 of the act of June 20, 1874, chap. 337, and the amendatory act of February 20, 1875, chap. 94, pledged for the payment of the interest and principal of the bonds known as the 3.65 District of Columbia bonds. 56.

EADS, JAMES B.

See **SOUTH PASS OF THE MISSISSIPPI, IMPROVEMENT OF.**

ENGINEERS, CIVIL, IN THE NAVAL SERVICE.

See **COURT-MARTIAL, 11; NAVY, 1.**

ENLISTMENT.

See **ARMY, 15; DESERTION, 4,**

ENROLLMENT AND LICENSE OF VESSELS.

1. Under section 4371 Revised Statutes, and the act of April 18, 1874, chap. 110, vessels usually called canal-boats, of more than five tons burden, trading from place to place in a district, or between different districts, on navigable waters of the United States (except such as are provided with sails or propelling machinery of their own adapted to lake or coastwise navigation, and also such as are employed in trade with the Canadas), are exempt from license or enrollment as well where in the trade in which they are engaged they do not enter a canal of a State, as where their voyages are partly on such navigable waters and partly on a State canal. 52.
2. The act of 1874 does not contemplate boats employed exclusively on the "internal waters" of a state where the same are not also navigable waters of the United States, nor boats employed exclusively on the "canals of a State." It contemplates boats

ENROLLMENT AND LICENSE OF VESSELS—Continued.

which are employed on navigable waters of the United States *as well as* on the canals or internal waters of a State. *Ibid.*

3. The rule as to exemption from enrollment or license provided by that act is not confined in its operation to waters within the interior of each State, but extends to any waters coming under the denomination of navigable waters of the United States, irrespective of their geographical location. *Ibid.*

ENTRANCE AND CLEARANCE OF VESSELS.

See CUSTOMS LAWS, 19.

EXPENSES OF DIRECT-TAX COMMISSIONERS.

See DIRECT-TAX LAW, 1, 2.

EXTRA COMPENSATION.

See COMPENSATION, 33, 34.

EXTRADITION.

L., a naturalized citizen, having fled the United States, was arrested in Ireland at the instance of this government, and extradited, under the treaty of 1842 with Great Britain, upon the charge of forgery. The extradition proceedings occurred in the spring of 1875, under the British act of 1870. Upon being brought back to this country he was arrested upon bench warrants issued by a United States circuit court, based on charges of other offenses committed before his surrender, and he has since also been served with a *capias* issued by the same court in a civil suit brought by the United States to recover a debt due prior to his surrender. Immunity from prosecution in any civil action, or for any offense other than that for which he was extradited, being claimed by him—upon the following grounds mainly: (1) that such immunity is provided for by the British act of 1870, under which the extradition proceedings took place; (2) that the immunity arises by implication out of the treaty of 1842 alone; (3) that it is conceded by section 5275 Revised Statutes—he petitions the Executive to instruct the proper officers not to prosecute further the civil suit against him, nor any criminal proceeding against him for an offense other than that for which he was extradited, and that he be discharged from arrest under the said bench warrants: *Advised* that section 5275 Rev. Stat. has no application to the present case; that, by force of section 27 of the British act of 1870, in all cases of difference between that act and the treaty of 1842, the treaty controls, and hence the immunity claimed here must be referred to that treaty considered alone; that this claim for immunity is not warranted by the said treaty; and that no ground has been laid by the petitioner entitling him to the instructions asked for. 500.

FEES COLLECTED FROM VESSELS, DISPOSITION OF.

In view of the absence of anything in the Revised Statutes indicative of an intent to change the purpose for which the fees enumerated in section 4381 were originally established, or to introduce a new rule of distribution: *Held* that, notwithstanding the revision omits the provision of the act of 1793 regulating the distribution of such fees, they should be distributed, as they have heretofore been, under the rule prescribed by that act. 44. (See, also, *Note*, p. 45.)

FEES OF CLERKS OF U. S. COURTS.

See COMPENSATION, 21, 22, 30.

FEES OF DISTRICT ATTORNEYS.

See COMPENSATION, 9, 21, 22, 29.

FEES OF MARSHALS.

See COMPENSATION, 16, 17, 21, 22, 23, 27, 28, 30.

FIFTEEN PER CENT. CONTRACTS.

See CONTRACT, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17.

FILES OF THE EXECUTIVE DEPARTMENTS.

See DEPARTMENT, 2, 3, 4, 6.

FIRE ARMS, DRAWBACK ON.

See CUSTOMS LAWS, 18.

FISHERIES.

See TREATIES WITH FOREIGN GOVERNMENTS.

FOREIGN MINISTER.

See RESIGNATION, 1.

FORFEITURE.

See CONTRACT, 20, 21, 23; NAVY, 2; POSTAL LAWS, 11; REMISSION OF FORFEITURE, 1.

FOX AND WISCONSIN RIVERS IMPROVEMENT.

Under the act of March 3, 1875, to aid in the improvement of the Fox and Wisconsin Rivers (18 Stat., 506), the officers in charge of that work cannot acquire land needed therefor by purchase directly from the owner, but must have recourse to condemnation. 31.

FURLOUGH.

See ARMY, 14.

GERMAN-AMERICAN SAVINGS BANK, OF WASHINGTON.

See CURRENCY.

GOLD COIN, DISPOSAL OF.

See SECRETARY OF THE TREASURY, 10, 11.

GOVERNMENT TELEGRAMS.

See TELEGRAPH, 2, 3, 4.

GRADUATE.

See NAVAL ACADEMY, 4; NAVY, 2.

HAZING.

See NAVAL ACADEMY, 1.

HIGGINS, THOMAS L., CLAIM OF.

See CLAIMS, 6.

HOT SPRINGS COMMISSION.

The provision in the sixteenth section of the act of March 3, 1877, chap. 108, relating to the Hot Springs Commission, namely, "That said commissioners shall hold their offices for the period of one year from the date of appointment," fixes the duration of the term of the commission, and without further legislation it cannot be continued beyond the period indicated therein. 430.

HUNTER STAMP, USE OF.

See INTERNAL REVENUE, 2.

INDIAN AGENTS AND AGENCIES.

1. Under section 2053 Rev. Stat., the President has discretionary power to dispense with the services of any Indian agent; and, under sections 1224 and 2062 Rev. Stat., he is authorized to assign a military officer to execute the duties of such agent, if this can be done without separating the officer from his company, regiment, or corps, or otherwise interfering with the performance of his military duties; or, under section 2053 Rev. Stat., he may devolve the duties of such agent upon an agent who has been appointed for another agency. 405.
2. The President can, under section 2059 Rev. Stat., discontinue any agency, whereupon the functions of the agent would cease. He can also, under the same section, transfer the agency to another place; for instance, to the vicinity of a military post, should it be contemplated to require a military officer to perform the duties of agent. *Ibid.*
3. Under section 2045 Rev. Stat., an Indian agent may, *at any time*, be suspended, and the place temporarily filled in the mode there provided. *Ibid.*

See INDIAN TERRITORY: PRESIDENT, 1.

INDIAN TERRITORY.

A military officer, unless he be an Indian agent, or be called upon to act by such agent, has no power to arrest fugitives from justice in a State who have escaped into the Indian Territory. Such persons may be removed from the Territory as intruders, and surrendered to the State authorities, by the proper Indian agent. 601.

INDIAN TREATIES.

Stipulations in Indian treaties existing prior to June 20, 1874, for the payment of annuities, &c., are contracts within the meaning of the second *proviso* of the fifth section of the act of June 20, 1874, chap. 32⁸, and their fulfillment is not to be prevented by any operation given to that section. 632.

INTERNAL REVENUE.

1. The amount of taxes illegally collected from the Illinois Central Railroad Company from 1863 to 1866, as income tax upon dividends on stock held by non-resident aliens, should be repaid to that company, after deducting so much therefrom as has already been paid over to the stockholders lawfully entitled thereto.
2. Sections 3445 and 3446 Rev. Stat. give the Secretary of the Treasury and the Commissioner of Internal Revenue power to require and enforce the use of the so-called Hunter stamp upon cigars. 191.
3. Regulations promulgated under and in conformity with those sections have the force of law; and a failure to comply therewith is punishable under the general clause of section 3456 Rev. Stat. *Ibid.*
4. The terms "capital" and "capital employed," as used in paragraph *second* of section 3408 Rev. Stat., include such portion of the capital of any bank, association, company, corporation, or person mentioned therein as is invested in a banking house. 218.
5. Under that provision every banking association, company, or corporation is taxable for the fixed amount of its capital, and every private banker for the entire capital employed by him in the banking business, *less only* the average amount invested by them respectively in United States bonds. *Ibid.*
6. Under the amendment of section 3140 Rev. Stat., made by the act of February 27, 1877, chap. 69, the word "person," as used in chapter 4 of title 35 Rev. Stat., is to be understood as so including a corporation engaged in distilling spirits that it may give the bond and perform other acts required by the internal revenue law of distillers, in its corporate capacity. 230.
7. The existence of a penalty in certain sections of that title, prescribing *imprisonment* as a part of the punishment, is not incompatible with an intent to include under the word person, as therein employed, a corporation. *Ibid.*
8. The Eagle and Phenix Manufacturing Company, a Georgia corporation, with a large capital invested in mills, machinery, &c., by authority of an act of the Georgia legislature passed in 1873 established a savings bank in connection with its manufacturing business, pledging the entire capital stock and property of the company for the payment of depositors and the holders of certificates of deposits issued thereby. By the same act the company was authorized to issue certificates of deposit "to an amount equal to the amount actually deposited, in sums of five,

INTERNAL REVENUE—Continued.

two, and one dollars, which may be payable to the holder of the same, and may be circulated by delivery as currency," which were issued and employed as currency in the business of the company: *Held* that the company is subject to the tax imposed by the second paragraph of section 340 Rev. Stat., of "one-twenty-fourth of one per centum each month" upon its whole capital stock. 371.

9. The limitation in section 322 Rev. Stat., relative to claims for the refunding of internal-revenue taxes, has no application to claims for allowances for stamps under section 342 Rev. Stat. Opinion of January 7, 1875, in 14 Opin., 513, overruled. 426.

10. That limitation is intended to apply to the claims described in section 3220 Rev. Stat. only. *Ibid.*

11. Documentary stamps presented under section 3426 Rev. Stat., above the denomination of two cents, which have been spoiled, or improperly or unnecessarily used, or are affixed to blank instruments, &c., and which are therefore not in the same condition as when issued, cannot be redeemed by the Commissioner of Internal Revenue, *unless* the person presenting them satisfactorily traces the history thereof, as provided by the *proviso* in the act of July 12, 1876, chap. 181. *Ibid.*

12. Where certain savings banks, without capital stock, received daily deposits from others than their regular depositors, under agreement that no interest should be allowed thereon, but that they might be checked out without previous notice, and that the checks should be paid by drafts on Boston when so required, to meet which drafts a fund was kept on deposit in a Boston bank, upon which interest was allowed the savings banks at the rate of four per centum per annum: *Held* that these savings banks are not entitled to exemption from taxation on said deposits under section 9 of the act of July 13, 1866, chap. 184 (nor under section 3407 Rev. Stat.). 452.

13. The *proviso* in section 31 of the act of June 6, 1872, chap. 315, authorizing the use of wood, metal, paper, &c., separately or in combination, for packing tobacco, snuff, and cigars, under regulations of the Commissioner of Internal Revenue, does not by implication modify or in any way affect the requirement of the act of July 20, 1864, chap. 186, section 29, that certain numbers and names be burned into cigar-boxes with a branding-iron before removing them from the manufactory. 516.

14. The terms of section 3251 Rev. Stat., namely, "every person in any manner interested in the use of any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom," include stockholders of private corporations engaged in distilling for gain. 559.

INTERNATIONAL PENITENTIARY CONGRESS.

See PRESIDENT, 15.

JURISDICTION.

1. A merchant vessel, except under some treaty stipulation otherwise providing, has no exemption from the territorial jurisdiction of the harbor in which the same is lying. 178.
2. The right "to sit as judges and arbitrators in such differences as may arise between the captains and crews," given to consuls, vice-consuls, &c., by article 13 of the treaty with Sweden and Norway of 1827, is limited to the determination or arbitrament of disputes and controversies of a civil nature, and does not extend to the cognizance of offenses. *Ibid.*
3. If the conduct of the captains or of the crews, where differences arise between them, is such as to "disturb the order or tranquillity of the country" (which includes all acts, as against each other, amounting to actual breaches of the public peace), the right of the local authorities to interfere, in the exercise of their police and jurisdictional functions, is reserved in said article. *Ibid.*
4. *Seemle* that a more enlarged jurisdiction is conferred upon consuls in some other treaties, as, *e. g.*, in the treaty with France of February 23, 1853, in the treaty with the German Empire of December 11, 1871, and in the treaty with Italy of February 8, 1868. *Ibid.*

See **TRANSFER OF JURISDICTION.**

KIDDOO, COL. J. B., CASE OF.

See **ARMY**, 5.

LACEY, ROBERT B., PAYMENT TO.

See **COMPENSATION**, 1.

LAND, PURCHASE OF.

See **PURCHASE OF LAND.**

LANDS, PUBLIC.

1. Four persons, citizens of the United States, located 1,000 feet on the Red Pine Lode, in Utah Territory, in July, 1871. One of them, in July, 1872, assigned to S., an alien, 400 feet of the same mine. In January, 1874, S. assigned the said 400 feet to D., a citizen of the United States, who has obtained the remainder of the 1,000 feet by proper assignments. Application is made by D. for a patent for the whole thousand feet: *Held* that D., by reason of the alienage of S., derived no right through him to a patent for the 400 feet referred to, and that he is entitled to a patent for only the 600 feet obtained from the other assignors. 29.
2. The Commissioner of the General Land Office is authorized to receive proofs of the swampy character of lands disposed of by the United States between March 2, 1855, and March 3, 1857, with a view to allowing the States the indemnity provided by the act of March 3, 1857, chap. 117, notwithstanding the omission in the Revised Statutes (section 2484) of that part of the act which granted the indemnity. 340.

LANDS, PUBLIC—Continued.

3. The right to indemnity, under that act, for swamp lands thus disposed of, is a right that "accrued" to those States in which such lands are situated prior to the adoption of the Revised Statutes, and is saved by section 5597 Rev. Stat. from being affected by the repeal of the omitted indemnity provision under the operation of section 5596 Rev. Stat. *Ibid.*
4. The Secretary of the Interior, by a decision dated August 4, 1871, rejected an application of the New Idria Mining Company, made under the act of July 26, 1866, chap. 262, for a patent of certain mineral lands in California. Subsequently the company filed an application for a rehearing, accompanied by affidavits obtained for the purpose of curing defects in the original application. The application for rehearing was denied by the Secretary April 27, 1872, but was reinstated by him June 15, 1872, since which time no action has been taken thereon. On March 3, 1875, Congress passed an act (chap. 130) requiring the Secretary of the Interior to furnish to that body at the beginning of its next session certain information respecting the lands in question; in compliance with which the Secretary made a report to Congress December 8, 1876; but thus far Congress has not acted further in the matter. In the meantime an ejectment suit, brought against the company by an adverse claimant of said lands, has been brought before the Supreme Court of the United States on a writ of error, and is still pending there. The company now ask that their case be taken up and reviewed upon the proofs originally made, the affidavits filed with the application for a rehearing, and the provisions of the act of May 10, 1872, chap. 152: *Held* (1) that the application for rehearing is fairly before the Department and can properly be considered; (2) that the action of Congress (in 1875) presents no obstacle to a determination of the matter of the application; (3) that the applicants are entitled to have their case adjudicated upon the law as it exists, and that, so far as any anticipated legislation is concerned, it is the duty of the Secretary of the Interior now to proceed with all reasonable expedition and determine the case: But *held*, further, that in view of the bearing which a decision in the case pending before the Supreme Court may have upon the matter, and also of other circumstances, the Secretary may, if he thinks justice requires it, properly delay his determination until that decision is rendered. 388.
5. The words "reserved for public uses," as employed in section 7 of the act of March 3, 1853, chap. 145, and section 6 of the act of July 23, 1866, chap. 219, were not meant to apply to lands which passed to the State of California under the swamp-land act of September 28, 1850. 454.
6. That State is not entitled to indemnity, under those enactments, for school sections falling within the swamp-land grant. *Ibid.*

LAS ANIMAS GRANT.

1. The action of the register and receiver of the proper land district, in passing upon claims of derivative claimants to lands theretofore claimed by Vigil and St. Vrain, under the provisions of the act of February 25, 1869, chap. 47, amendatory of the act of June 21, 1860, chap. 167, was final, and not subject to revision by the Land Department. 94.
2. Col. William Craig, a derivative claimant under Vigil and St. Vrain, having established his claim "to the satisfaction" of the register and receiver of the proper land district, thereby became entitled to have furnished to him by the surveyor-general of Colorado, as evidence of title, an approved plat of the land which was awarded to him by the register and receiver aforesaid. In view of which: *Advised* that the President direct the Commissioner of the General Land Office to instruct the surveyor-general of Colorado to deliver to Colonel Craig an approved plat of the land so awarded. *Ibid.*

LEASE.

A building in Chicago, known as "The Arcade," was leased to the United States, "to have and to hold, &c., from the 3d day of May, 1874, for and during the term of three years thence next ensuing." The lease contained a clause providing that the lessor might use such part of the building as was not needed by the lessee, "in accordance with the terms of acceptance of said building by the Hon. Secretary of the Treasury, as shown by copy of his letter, attached hereto, and made part of this agreement." This letter, after referring to a proposition made in behalf of the owner of the promises to lease so much of the same as may be needed by the Government "until the public building to be erected in Chicago is ready for use," states under what circumstances the owner would be permitted to occupy a part of the premises, and "upon these conditions" the Secretary concludes to take the building: *Held* that the term of the leasehold is governed (not by the letter of acceptance, in which it might endure beyond three years, but) by the provision in the lease above quoted, which definitely limits its duration to three years from the 3d of May, 1874. 613.

LETTING CONTRACTS.

See **CONTRACT**, 28, 29, 30, 31, 32.

LICENSE AND ENROLLMENT OF VESSELS.

See **ENROLLMENT AND LICENSE OF VESSELS**.

LIGHT-HOUSES, DISBURSING AGENTS FOR.

See **COMPENSATION**, 18.

LIMITATIONS.

See **DESERTION**, 1, 2, 3, 6; **INTERNAL REVENUE**, 9, 10.

LOSS OF REGISTERED MAIL MATTER.
See **POSTMASTER-GENERAL**.

LOST REGISTERED BOND.
See **BONDS OF THE UNITED STATES**, 5.

LOTTERIES.
See **POSTAL LAWS**, 8.

LOYALTY.
See **ACCOUNTS AND ACCOUNTING OFFICERS**, 13.

MARINE CORPS.

A board of officers, duly constituted, was convened by an order of the Secretary of the Navy, dated July 30, 1874, to inquire into and determine whether W., a lieutenant of marines, was incapacitated for active service. The board found him so incapacitated, and that the cause of his incapacity was not an incident of the service. On submission of the proceedings and finding of the board to the President, he, under date of August 18, 1874, indorsed thereon: "I concur in opinion with the retiring board in the case of W. Let him be retired on furlough pay." Held (1) that the action of the President amounted to an approval of the finding of the board, and to a retirement of W. from "active service," within section 1252 Rev. Stat., and that he was retired in conformity with the law applicable to officers of the Marine Corps; (2) that W. thereby became entitled to receive pay according to the rate established by law for retired officers of the Marine Corps (viz, 75 per centum of the pay of the actual rank held by him at date of retirement), notwithstanding a different rate of pay (viz, furlough pay) was named by the President in retiring him. 442.

MARSHAL.
See **COMPENSATION**, 16, 17, 21, 22, 25, 27, 28, 30; **TRAVELING ALLOWANCES**, 1.

MARSHAL OF THE DISTRICT OF COLUMBIA.
See **COURT OF COMMISSIONERS OF ALABAMA CLAIMS**.

METRIC SYSTEM.
See **POSTAL LAWS**, 9.

MILEAGE OF ARMY OFFICERS.
See **TRAVELING ALLOWANCES**, 4, 5; **WITNESS**, 2.

MILEAGE OF MARSHALS.
See **TRAVELING ALLOWANCES**, 1.

MILEAGE OF NAVAL OFFICERS.
See **TRAVELING ALLOWANCES**, 2, 3.

MILITARY ACADEMY.

1. An officer of the Army, holding the rank of a major-general, may be assigned to the place of superintendent of the Military Academy. 110.
2. Sections 1310 and 1314 of the Revised Statutes, in so far as they apply to the selection of a superintendent of the Military Academy, considered and construed. *Ibid.*

MITIGATION OF FINE, PENALTY, OR FORFEITURE.

See SECRETARY OF THE NAVY.

NATIONALITY.

See CITIZENSHIP.

NAVAL ACADEMY.

1. The act of June 23, 1874, chap. 453, to prevent hazing at the Naval Academy, was designed to cut off from a cadet found guilty of the offense, should the finding of the court-martial be approved by the superintendent, all chance of reinstatement or reappointment. 80.
2. The provisions of article 36 of the Articles for the Government of the Navy (sec. 1624 Rev. Stat.) does not extend to cadets at the Naval Academy. They may accordingly be dismissed from the Academy and from the naval service for misconduct without trial by court martial. 634.
3. Sections 1519 and 1525 Rev. Stat. leave no right in the Secretary of the Navy to continue at the Academy cadets who have been found at any examination deficient in their studies without the recommendation of the academic board. *Ibid.*
4. The words "final graduating examination," in section 11 of the act of July 16, 1862, chap. 183, and "graduating examination," in section 12, of the act of July 15, 1870, chap. 295, signify that examination which, under the regulations of the Naval Academy, takes place after the prescribed term of sea-service has been performed. 637.
5. Assignments of relative rank, as between members of the same class, based upon the results of such examination, are in conformity with law. *Ibid.*

NAVAL OFFICER IN MERCHANT SERVICE.

A naval officer cannot lawfully serve as master of a private steam-vessel in the merchant service without having previously obtained the license required by section 4438 of the Revised Statutes, although he may be eligible, by virtue of his commission, to take command of a steam-vessel of the United States in the naval service. 61.

NAVIGATION.

1. Where a vessel put into harbor "in a furious storm," and, leaking badly, was run ashore, thereupon becoming a wreck, which forms

NAVIGATION—Continued.

an obstruction to navigation: *Held* that (the wreck appearing to have been caused by stress of weather, and not through any fault or misconduct on the part of the master and crew) the owners of the vessel are under no legal obligation to remove it, and that the case does not warrant the institution of proceedings to that end against them. 71.

2. Congress having made an appropriation for the improvement of the Connecticut River, to be expended under the direction of the Secretary of War, the latter has power, under this legislation, to remove a wrecked vessel lying in that river, without waiting until it is abandoned, if in his judgment it constitutes an obstruction to navigation. 284.
3. In the absence of legislation by Congress upon the subject of the improvement of the harbor of Saint Louis, or of the navigation of the Mississippi River at that point, no one is authorized to institute judicial proceedings in behalf of the United States against the city of Saint Louis for the abatement as a nuisance of the Bryan street dike, constructed by that city in said river. 515.
4. The anticipation that, should such legislation hereafter be adopted, the dike will be an obstacle, is no ground for interference. *Ibid.*
5. Where a dike was being constructed by an iron company in the Ohio River, leading from the shore to deep water, which it was apprehended by persons engaged in navigating that river would obstruct its navigation, and application was made by the latter to the engineer officers of the United States to interfere: *Held* that in the absence of Congressional legislation the public authorities of the United States have no power to deal with such a matter. 526.

NAVY.

1. Civil engineers, appointed under section 1413 Rev. Stat., are officers of the Navy within the meaning of articles 36 and 37 of section 1624 Rev. Stat. 165.
2. Officers and men in the naval service do not incur any forfeiture or loss of pay by confinement or suspension from duty under sentence of a court-martial, unless the forfeiture or loss be imposed by the sentence. 175.
3. In estimating length of service, for the determination of precedence with other officers with whom they have relative rank, engineer officers of the Navy who are graduates of the Naval Academy are not entitled to the six years' constructive service allowed to other staff officers of the Navy for that purpose. Section 1484 Rev. Stat. is to be construed as an exception to section 1486 Rev. Stat., operating to exclude from the provisions of this last section such engineer officers. 336.
4. But engineer officers not graduated at the Naval Academy stand on the same footing with other staff officers, and are entitled to the six years' constructive service. *Ibid.*

NAVY—Continued.

5. Upon examination of the finding of the retiring board in the case of Paymaster Rodney, of the Navy, the proceedings in which took place in June, 1871, and were approved by the President August 31, 1871, who at the same time directed that Paymaster R. be retired on furlough pay: *Advised* that the board found the latter incapacitated upon the sole ground that his peculiar mental temperament unfitted him for active service in the Navy; that his consequent retirement was not "because of misconduct;" and that there is no legal ground for setting aside the proceedings of the retiring board and revoking the order of retirement in his case. 446.
6. Whether the finding of the board was warranted by the evidence adduced cannot now be inquired into, as no power of review over its proceedings exists. *Ibid.*
7. Q., a commander in the Navy, having been tried and sentenced to dismissal from service by a naval court-martial, the record of the proceedings and sentence was submitted to the President, who, on the 5th of June, 1874, approved the same. On the 9th of same month the Secretary of the Navy addressed a letter to Q. (then in Boston) informing him of the approval of the sentence, and stating that from that date (June 9, 1874) he would "cease to be an officer of the Navy." On the 12th of same month the Secretary again addressed a letter to Q., asking him to return the letter of dismissal. On the 8th of December following the Secretary addressed a third letter to Q., stating that the sentence of the court-martial "was, on the 9th day of June, 1874, mitigated to suspension from rank, &c., to date from that day." In the mean time, viz., on the 10th of June, S., a lieutenant-commander, was nominated to be a commander in the Navy, from the date last mentioned, vice Q., dismissed, and this nomination was confirmed on the 12th of June, and a commission issued to S. same day. *Held:* (1.) That the letter of the Secretary of the Navy of December 8 is satisfactory proof, not only of the mitigation of the sentence by the President, but that it was mitigated by him on the 9th of June. (2.) That the letter of dismissal, in execution of the sentence, forwarded by the Secretary on the 9th of June (it being manifest that the complete execution of the sentence, by means of that letter, could not take place on that day), was *then* revocable; and the mitigation of the sentence was in effect a revocation of the letter. (3.) That it was competent to the President, under the circumstances, to mitigate the sentence when he did. (4.) That the subsequent appointment of S. could not render ineffectual the previous mitigation of the sentence. 463.
8. In view of the fact that the *mitigated* sentence has been put in execution by a former administration, by which all questions in the premises must be presumed to have then been fully considered:

NAVY—Continued.

Advised that this action be now treated as a final determination of the matter as regards the status of Q. 464.

9. In October, 1861, S. was appointed by the Secretary of the Navy "an acting master in the Navy, on temporary service," and was dismissed from the service by the Secretary in March, 1862: *Held* that the dismissal was lawful—that in the absence of legislation the Secretary had power to determine the time at which an appointment expressly temporary should come to an end. 560.

10. In January, 1864, S. was appointed by the Secretary of the Navy "an acting gunner on temporary service" in the volunteer Navy, and in July, 1865, was dismissed from the service by the Secretary: *Held* that a power to appoint gunners to an undefined extent does not preclude the appointment of acting gunners also; that the power to appoint the latter is implied by section 18, act of July 17, 1862, chap. 204 (Rev. Stat., sec. 1410); and that, as an acting gunner, S. was liable to dismissal at the will of the Secretary. 564.

NEW IDRIA MINING COMPANY.

See LANDS, PUBLIC, 4.

OBSTRUCTION TO NAVIGATION.

See NAVIGATION, 1, 2, 3, 4, 5.

OCEAN MAIL SERVICE.

See CONTRACT, 33, 34.

OFFICE OF TRUST.

The positions held by the commissioners appointed by the President for the Centennial Exhibition are offices of "trust," within the meaning of section 9, article 1, of the Constitution. 187.

OFFICER.

The commissioners appointed by the President for the Centennial Exhibition, under section 3 of the act of March 3, 1871, chap. 105, though charged with duties of a special and temporary character, are officers of the United States. 187.

OFFICIAL BOND.

The liability of sureties upon the official bond of a collector of customs is limited to acts done by him during his term of office. They are not responsible for defaults committed in relation to public moneys received by him after the term for which he was appointed. 214.

See PENSION AGENCIES AND AGENTS, 6.

OFFICIAL ENVELOPE.

1. Sections 5 and 6 of the act of March 3, 1877, chap. 103, providing for the use of the official envelope, do not forbid the use of stamps by the Executive Departments. Each Department designated in

OFFICIAL ENVELOPE—Continued.

section 2 of the act of March 3, 1877, chap. 102, and in the corresponding provision in the act of August 15, 1876, chap. 287, may, in its discretion, use stamps for official mail matter under and in conformity to these acts, or use the official envelope for such matter under and in conformity to sections 5 and 6 of the act of March 3, 1877, chap. 103, or it may use both. 262.

2. The use of the official envelope is, by sections 5 and 6 of the act of March 3, 1877, chap. 103, limited to the Executive Departments, and the bureaus or offices therein, at the seat of Government. *Ibid.* [But by section 29 of the act of March 3, 1879, chap. 180, the provisions of those sections are "extended to all officers of the United States Government, and made applicable to all official mail matter transmitted between any of the officers of the United States, or between any such officer and either of the Executive Departments or officers of the Government." Under a *proviso* pension agents and "other officers who receive a fixed allowance as compensation for their services, including expenses for postage," are excepted.]
3. The provisions of the act of March 3, 1877, relating to the official envelope, do not extend to the Executive. In the absence of a special provision for stamps for his official mail matter, the appropriation for contingent expenses of the Executive office is applicable to that object, and to the extent that it is so applied authority exists for the issue of stamps to him. *Ibid.* (See *supra*, par. 2.)
4. The State and other Departments named in section 2 of the act of March 3, 1877, chap. 102, being thereby authorized to make requisition for stamps "not exceeding the amount stated in the estimates" submitted to Congress, *semble* that where one of these Departments has failed to submit an estimate it is precluded from making the requisition, and thus is restricted to the use of the official envelope. *Ibid.*
5. The provision in the act of February 27, 1877, chap. 69, amending section 3915 Rev. Stat., does not authorize the issue of official postage-stamps for the use of the Post-Office Department during the next fiscal year, if no appropriation has been made therefor. In this case the use of the official envelope, under the act of March 3, 1877, chap. 103, is the only mode of transmitting mail matter which will be available to that Department and the bureaus or offices therein during that year. 263.
6. What provision exists in such case for official mail matter of post-masters considered and stated. *Ibid.*

OLD MATERIAL, DISPOSAL OF.

See SECRETARY OF THE TREASURY, 8.

PACIFIC RAILROADS.

1. Inquiry being made whether the Union Pacific Railroad Company should be paid the compensation for mail transportation fixed by

PACIFIC RAILROADS—Continued.

Congress for railroads generally, or should be paid as compensation therefor what is paid by private parties for service of a similar kind, and also whether that company is subject to the reduction of compensation provided in the act of July 12, 1876, chap. 179: *Advised* that (until a final and authoritative judicial determination of the questions raised) the Postmaster-General apply the same rules in dealing with that company which Congress has made applicable to railroad companies in general. 610.

2. Section 6 of the act of July 1, 1862, chap. 120, leaves the United States free, as against the Union Pacific Company, to resort to either the general rights which they have against all railroad companies or the special rights therein provided. *Ibid.*

PAINTINGS ON GLASS.

See CUSTOMS LAWS, 21, 22.

PARDON.

See CLAIMS, 9.

PASSPORT.

See CITIZENSHIP, 2, 3, 4.

PATENTED ARTICLE, CONTRACT FOR.

See CONTRACT, 1.

PATENT.

See LANDS, PUBLIC, 1.

PAY ACCOUNTS OF ARMY OFFICERS.

1. The Secretary of War may properly issue an order authorizing pay-masters of the Army to make a certificate upon the pay-accounts of officers in the following form: "The within account is believed to be correct, and would be paid by me if I had public funds available for that purpose." Such certificate would not come under the prohibition of section 3679 Rev. Stat. 271.
2. Section 3477 Rev. Stat. does not forbid the transfer or assignment of their pay-accounts by Army officers after the same become due. Such accounts may be lawfully transferred or assigned when due, the regulations of the Army relating to this subject (par. 1349, Art. XLV, Regulations of 1863) being complied with. *Ibid.*

PAYMENT OF CLAIMS.

See REQUISITION, ISSUE OF.

PENSION.

1. The words "pensioner" and "person entitled to a pension," in section 4718 Rev. Stat., include a widow pensioner. 591.
2. *Held*, accordingly, that where a widow pensioner died, leaving an "accrued pension," no child surviving, the person who bore the

PENSION—Continued.

expenses of the last sickness and burial of the deceased is entitled to reimbursement from such pension in case sufficient assets to meet such expenses were not left. *Ibid.*

PENSION AGENCIES AND AGENTS.

1. The law concerning the establishment of pension agencies and the appointment of pension agents, as it existed before and at the time of the adoption of the Revised Statutes, reviewed. 246.
2. Sections 4778, 4779, and 4780 Rev. Stat. produce no change in the previous state of the law on that subject. *Ibid.*
3. The President has authority to consolidate two or more pension agencies into one, by discontinuing some agencies and transferring the business thereof to others. *Ibid.*
4. Upon the discontinuance of an agency the official functions of the incumbent cease; his hold on the office necessarily terminates with its extinguishment, and the tenure-of-office law no longer applies. *Ibid.*
5. Incumbents of agencies, whose districts are subsequently enlarged by the transfer thereto of the business of discontinued agencies, are competent to perform the duties thereof as well after as before the enlargement, and new appointments are not made necessary by the change. It is otherwise with the incumbent of an agency which has been discontinued. The latter cannot be put in charge of another separate and distinct agency without a new appointment. *Ibid.*
6. A bond conditioned for the faithful discharge of all the duties of the office "according to the laws and instructions which are now in force, or which shall be in force at any time during" the continuance of the agent in office, will, in the case of an agent whose agency is enlarged during his term in the manner above indicated and upon whom increased duties are thus devolved, subject the sureties thereon to liability after the enlargement of the agency. *Ibid.*

PERIODICAL PUBLICATION.

See **POSTAL LAWS**, 10.

POSTAL LAWS.

1. *Sembler* that it is a violation of section 5474, Rev. Stat., for a mail contractor to employ an express company not under his control to carry mail matter committed to his charge. 70.
2. The Pittsburg, Cincinnati and Saint Louis Railroad Company is entitled to nothing for mail service beyond what has been paid thereto according to established usage prior to July 1, 1873. But having protested against the continuance of that method of adjustment after July 1, 1878, claiming compensation in accordance with the terms of the act of March 3, 1873, the company is entitled for this period to compensation as claimed. 74.

POSTAL LAWS—Continued.

3. Where two railroad corporations run from their point of junction to a common terminus (over the same track) separate trains with postal cars carrying the mails, and route-agents to accompany the same, each such corporation is entitled, under the act of March 3, 1873, chap. 231, to be paid at the rates thereby provided for the average weight of mails carried by it to the common terminus. 92.
4. Railroad companies, carrying the mails under the arrangement and classification of the Postmaster-General, agreeably to the law as it existed prior to March 3, 1873, cannot now claim additional compensation. *Ibid.*
5. The compensation to railroad companies authorized to be fixed by sections 4002 to 4005 Rev. Stat., for the use of railway post-office cars furnished by them, is not affected by the provisions of the first section of the act of July 12, 1876, chap. 179. 169.
6. Where the duties of "special agents" employed by the Postmaster-General, under section 4017 Rev. Stat., concern the railway postal service, such agents may, so far (and so far only) as regards the performance of those duties, be placed under the supervision of one or both of the officers authorized to be appointed by the Postmaster-General by section 4020 Rev. Stat. to superintend the railway postal service. 171.
7. The provision in the act of July 12, 1876, chap. 179, directing the Postmaster-General to make a 10 per cent. reduction of the compensation to railroad companies for carrying the mails, operates prospectively, and does not affect existing contracts which were authorized by the law in force at the time of their execution. As to these, the rate remains as stipulated during the period fixed by the agreement. 182.
8. Under section 3894 Rev. Stat., as amended by section 2 of the act of July 12, 1876, chap. 186, letters or circulars concerning legal as well as those concerning illegal lotteries are authorized to be excluded from the mails. 203.
9. The provision in section 3880 Rev. Stat., declaring fifteen grammes of the metric system to be the equivalent of a half ounce avoir-dupois, does not apply to all postal matter. Its application is limited to mail matter between this and foreign countries on which the rates of postage are determined by weight according to the metric system. 224.
10. The Lakeside Library, a literary paper, printed and published periodically in parts or numbers at definite intervals, is a periodical publication within the meaning of section 5 of the act of June 23, 1874, chap. 456, and, when addressed to news agents or regular subscribers, is entitled to pass at a rate of postage prescribed for "periodical publications." 345.
11. During the railroad troubles (labor strikes) of 1877, the Michigan Central Railroad Company (with which there was a written contract for mail service, containing special provision as to forfeiture

POSTAL LAWS—Continued.

of pay) and the Cleveland and Pittsburgh Railroad Company (with which there was no contract in writing, but which was engaged in the performance of "recognized service" in the conveyance of the mail) failed to transport the mail over their respective roads for a day or two, on account of which deductions were made from their pay: *Held* that it was competent to the Postmaster-General to make the deduction in both cases. 440.

12. Upon the facts stated, the mail transportation performed by the Chicago, Burlington and Quincy Railroad Company subsequently to July 1, 1875, was (not service under a contract, but) "recognized service"; and the action of the Postmaster-General, on the 16th of October, 1876, abating the rate payable to the company 10 per centum, in accordance with the provisions of section 1 of the act of July 12, 1876, chap. 179, was proper. 482.

13. Case of the Baltimore Central Railroad Company, and also of the Delaware Branch Railroad Company, concerning mail transportation between Philadelphia and Chester by the former company and between Philadelphia and Wilmington by the latter company—service by each company performed over the track of the Philadelphia, Wilmington and Baltimore Railroad Company, over which this last-mentioned company at the same time transported the mail—*held* to be governed by the principles applied to the case of the Rockford, Rock Island, &c., Railroad Company, in the opinion of the Attorney-General of May 6, 1876. 598.

14. Case of the Philadelphia, Wilmington and Baltimore Railroad Company, the Baltimore Central Railroad Company, and the Delaware Railroad Company, for mail transportation performed over the track of the first-named company, which was considered in opinion of November 23, 1876, reviewed upon additional facts furnished; and *held* that the periodical settlements heretofore made by the Philadelphia, Wilmington and Baltimore Company with the Post-Office Department, agreeably to an arrangement between the three companies, for the whole of such mail-service over the common track, from 1873 to 1876, ought to stand. 602.

15. The view of the Attorney-General, expressed in an opinion dated May 6, 1876, that there may be several post-office routes over the same railroad track, does not at all forbid that several railroad companies using the same track may so far be serving but one post-office route. *Ibid.*

POSTMASTER-GENERAL.

The Postmaster-General has no authority, under section 398 Rev. Stat., to negotiate a postal convention providing for the payment of indemnity for the loss of registered articles or letters. To enable him to do so further legislation is required. 462.

See ADVERTISEMENTS, 5; CLAIMS, 1, 2, 14; CONTRACT, 2, 4, 33, 35; PACIFIC RAILROADS, 1; POSTAL LAWS, 7, 11, 12.

POST-TRADER.

1. A post-trader appointed for a military post under section 3 of the act of July 24, 1876, chap. 226, is removable at the pleasure of the Secretary of War. 278.
2. Such trader is simply a person licensed by the Secretary of War, with the concurrence of the council of administration and commanding officer, to carry on a certain traffic at a military post; and his removal would consist merely in a revocation of the license by the Secretary, in which the concurrence of the council of administration and commanding officer of the post is not required. *Ibid.*

PRESERVATION OF ARMY CLOTHING.

See APPROPRIATIONS, 1, 2.

PRESIDENT.

1. Under sections 205^a and 208^b Rev. Stat., the President may, in his discretion, devolve the disbursement of funds for the Indian agencies within a superintendency upon the superintendent thereof or upon the several Indian agents within the same superintendency. 66.
2. In the exercise of his general administrative superintendence, the President may interfere to restrain an officer from assuming an authority that does not belong to him, as well as to compel the officer to perform a duty that does belong to him. 94.
3. Hence it is competent to the President to entertain an appeal from the head of a Department which concerns the authority of a subordinate officer in the Department. *Ibid.*
4. The President has power to fill, by temporary appointment, in a recess of the Senate, a vacancy then existing which occurred during the next preceding session of that body. 207.
5. Concerning the power of the President to appoint general courts-martial, see *Note*, p. 297.
6. Power of the President respecting the suspension of civil officers appointed with the consent of the Senate, and his duty in regard to the nomination of persons in the place of suspended officers, and also in regard to the filling of vacancies in civil offices happening during a recess of the Senate, under the provisions of sections 1768 and 1769 Rev. Stat., stated. 375.
7. No duty is devolved upon the President to send in nominations to the Senate in place of suspended officers, or to fill vacancies, unless that body shall continue in session for thirty days. *Ibid.*
8. Where no nomination in place of a suspended officer has been sent in, and the Senate adjourns; or, a nomination having been sent in, the Senate adjourns without confirming it, the officer suspended thereupon becomes reinstated, but he may be again suspended by the President, as before. In the case of a *vacant* office, under like circumstances, the office would be in abeyance upon the adjournment of the Senate. 376.

PRESIDENT—Continued.

9. The President, in nominating a person to the place of a suspended officer, need not give any reasons for the suspension. *Ibid.*
10. Where an officer has been suspended during a recess of the Senate and another person designated to perform his duties, under section 1768 Rev. Stat., the President may at any time revoke the suspension and thus reinstate the officer. 380.
11. Under section 2053 Rev. Stat., the President has discretionary power to dispense with the services of any Indian agent; and, under sections 1224 and 2062 Rev. Stat., he is authorized to assign a military officer to execute the duties of such agent, if this can be done without separating the officer from his company, regiment, or corps, or otherwise interfering with the performance of his military duties; or, under section 2053 Rev. Stat., he may devolve the duties of such agent upon an agent who has been appointed for another agency. 405.
12. The President can, under section 2059 Rev. Stat., discontinue any agency, whereupon the functions of the agent would cease. He can also, under the same section, transfer the agency to another place; for instance, to the vicinity of a military post, should it be contemplated to require a military officer to perform the duties of agent. *Ibid.*
13. The President had, in 1861, power to dismiss from the service an officer of the Marine Corps. 421.
14. *Sembler* that section 17, act of July 17, 1802, chap. 200, in so far as it authorized dismissals by the President from the military service, was declaratory only of long-established law, and that the force of the provision is found in the word "requested," by which it was intended to re-enforce strongly this power in the hands of the President at a great crisis. *Ibid.*
15. The President has power to authorize the commissioner appointed under the joint resolution of February 16, 1875, to represent the Government at the International Penitentiary Congress to be held at Stockholm. 618.

See COURT-MARTIAL, 1, 3, 4, 5, 6, 7; NAVY, 7; OFFICIAL ENVELOPE, 3; PENSION AGENCIES AND AGENTS, 3; REVENUE MARINE; SUSPENSION OF OFFICERS, 1.

PRIVATE LAND CLAIMS.

In November, 1799, a concession of four square leagues of land, in territory now within the State of Missouri, was made by the Spanish authorities to M., for certain purposes. In February, 1806, the land was surveyed, and the survey certified to by the surveyor-general for Upper Louisiana. In June, 1806, and again in May, 1810, claim for the land under said concession and survey was presented by M. to the board of land commissioners for Louisiana Territory and was rejected. M. died on the 28th of May, 1814. On the 27th of April, 1816, Congress passed an act for the benefit of certain nephews of M., which released to and

PRIVATE LAND CLAIMS—Continued.

vested in them all the right, title, and interest of the United States in and to any real estate whereof M. died seized. The land included in said survey having since been surveyed by the United States as public lands, and a large part thereof disposed of, the heirs of the nephews aforesaid have applied for scrip under the act of June 2, 1858, chap. 81, in lieu of the land: *Held* (1) that M.'s seizure of the land referred to, at the time of his death, may be proved by traditionary or hearsay evidence; (2) that by the presentation of the concession and survey to the board of commissioners, and from the recognition by Congress of possession and claim according thereto as existing in claims of the same class from 1811 to 1829, M. must be regarded to have been seized of the land when he died; (3) that accordingly M. "died seized" of the land within the meaning of the act of 1816; (4) that this act is equivalent to a patent for a specific tract of land, and both located and satisfied the inchoate claim of M.; (5) that the act of 1858, being limited to land claims not located or satisfied, is inapplicable. 518.

PRIVILEGED COMMUNICATIONS.

1. Official correspondence between the Commissioner of Internal Revenue and a district attorney, in relation to cases of violation of the internal-revenue laws and to prosecutions thereunder, belong to that class of communications which, on grounds of public policy, are regarded as privileged, and the production of which in evidence, in a suit between private parties, the law will not enforce. 378.
2. A *subpoena duces tecum*, issued by a State court, was served upon a district attorney, requiring him to appear as a witness in a private suit and bring with him all letters and telegrams received from the Commissioner of Internal Revenue relative to certain causes then pending in a United States court on indictments under the internal-revenue laws: *Advised* that it would be proper for the attorney to appear before the State court in obedience to the writ, and there object to produce the papers on the ground that they are privileged, if, in his judgment or in that of the Commissioner, their production would be prejudicial to the public interests. *Ibid.*
3. An officer, under authority of the Treasury Department, advertised for proposals to furnish fuel. C., a bidder, addressed a communication to the officer relating to the responsibility of H., another bidder. The officer, in obedience to his instructions, submitted to the Department the bids received by him, and with them he forwarded the said communication. An action for libel having been brought by H. against C., and interrogatories therein concerning said communication filed in the Department: *Held* that the communication cannot properly be treated by the Secretary as a privileged one. 415.

PRIVILEGED COMMUNICATIONS—Continued.

4. In general only such communications as are made in the course of their official duties by the persons making them come within the rule of privileged communications, and are confidential under all circumstances. *Ibid.*
5. But in certain cases (indicated in the opinion) communications other than those of officials may be treated as confidential, and in these cases the Department would be justified, upon public considerations, in declining to furnish copies of such communications on the order of a court. *Ibid.*

PRIZE, DISTRIBUTION OF.

1. The words, "their respective rates of pay in the service," as used in section 10, paragraph numbered "fifth," of the prize law of June 30, 1864, chap. 174, signify the rates of pay actually established, and to which the parties concerned were entitled, at the time of the capture of the prize. 63.
2. Accordingly, the promotion of a naval officer to whom prize-money is distributable under said paragraph, conferred after the date of the capture of the prize, cannot affect the distribution of the fund, even though by the promotion he became entitled to increased pay from and including that date. In such case the rate of pay which the officer was in receipt of when the capture was made, not the increased pay resulting from the promotion afterwards bestowed, is the measure of his allowance under that provision. *Ibid.*
3. The commander of a single ship is by the prize law aforesaid restricted to one-tenth or three-twentieths (as the case may be) of the prize-money awarded to his vessel, and cannot share according to his rank, where that would give him more. *Ibid.*
4. Under a decree, in prize, of the district court of the United States for the southern district of Illinois, passed at its June term, 1868, certain moneys were paid into the Treasury to the credit of the naval pension fund. At its November term, 1869, in a proceeding for the reformation of that decree, due notice of which was given to the proper representative of the United States in the cause, the court modified its decree so far as to require the said moneys to be distributed to the captors named therein: *Held* that the decree as thus modified is the only final decree of the court in the cause, and should alone be regarded as the decree of the court, for the purpose of distribution of the funds, within section 16 of the act of June 30, 1864, chap. 174 (sec. 4641 Rev. Stat.), and that it is the duty of the Secretary of the Navy, and of all officers of the United States concerned, to give effect thereto. 575.
5. Opinions of Attorney-General Akerman and Attorney-General Williams in same matter (13 Opin., 299, 348; 14 Opin., 524), considered, and the apparent conflict between the view there taken and that here adopted explained by a material difference between the state of facts as then and that as now presented. 576.

PROCESS.

Process issued under the authority of a State cannot legally obstruct, directly or indirectly, the operations of the United States Government. 524.

PROPERTY LOST OR DESTROYED IN THE MILITARY SERVICE.
See CLAIMS, 13.**PROPERTY TAKEN FOR USE OF THE ARMY.**

See CLAIMS, 4, 5.

PUBLIC BUILDING.

The condition in the deed of the city of New York, conveying to the United States the site (viz, the lower part of the City Hall park) of the new post-office and court-house building, by which the title is subject to forfeiture in case the ground conveyed ceases to be used for the purposes of a post-office and court-house or either, or in case it is used for any other public purpose, is not violated by the occupancy and use of some of the rooms in the new building by certain officers of the internal revenue, steam-boat inspection, and other service under the control of the Treasury Department. 476.

PURCHASE OF LAND.

1. The provision in the act of March 3, 1875, chap. 134, making an appropriation for a movable dam, impliedly authorizes the purchase, with the approval of the Secretary of War, of such land as is necessary for the construction of the dam. 212.
2. Payment of the purchase money for the land may be made, though the legislature of the State has not consented to the purchase. Section 355 Rev. Stat. considered in connection with section 183² Rev. Stat. and constrnd. *Ibid.*

QUARTERMASTER'S DEPARTMENT, PROMOTION IN.

See ARMY, 13.

RAILWAY POST-OFFICE CARS.

See POSTAL LAWS, 54.

REBATE OF DUTIES.

See CUSTOMS LAWS, 13, 21.

REBELLION.

Sembler that in the State of Mississippi the war for the suppression of the rebellion ended on the 2d of April, 1865. 572.

RECOMMENDATIONS FOR OFFICE.

See DEPARTMENT, 2, 3, 4, 5.

REFUNDING ACT.

See BONDS OF THE UNITED STATES, 1, 2.

REFUND OF DUTIES.

See **CUSTOMS LAWS**, 14, 15; **SECRETARY OF THE TREASURY**, 1, 2
3, 4.

REFUND OF PAY, ETC., IN THE ARMY.

See **ARMY**, 6, 7.

REGISTRY OF VESSELS.

1. The word "wrecked," as used in section 4136 Rev. Stat., is applicable to a vessel which is disabled and rendered unfit for navigation, whether this condition of the vessel has been caused by the winds or the waves, by stranding, by fire, by explosion of boilers, or by any other casualty. 402.
2. To authorize the issue of a register under that section, it is sufficient if the cost of repairing the vessel—as well where, in so doing, the original plan of the vessel is departed from and changes in her construction and internal arrangement are made, new machinery, new appliances for her navigation, and other improvements introduced, as where the vessel is simply restored to what she originally was—equals three-fourths of her value when repaired.
Ibid.

RELATIVE RANK.

See **NAVY**, 3, 4; **NAVAL ACADEMY**, 5; **ARMY**, 19, 20, 21, 22.

REGULATIONS.

See **ARMY**, 19, 20, 21; **COURT-MARTIAL**, 2; **CUSTOMS LAWS**, 28;
INTERNAL REVENUE, 3; **NAVAL ACADEMY**, 4; **SECRETARY OF THE TREASURY**, 5, 6.

RELATIVE RANK.

See **ARMY**, 19, 20, 21, 22; **NAVAL ACADEMY**, 5; **NAVY**, 3, 4.

REMISSION OF FORFEITURE.

Where forfeiture or loss of pay is made a part of the sentence of a court-martial, in addition to confinement or suspension from duty, the former may be remitted by the proper authority, in whole or in part, without also remitting the latter. 175.

REMISSION OF SENTENCE OF COURT-MARTIAL.

See **COURT-MARTIAL**, 6.

RENTING BUILDINGS FOR GOVERNMENT PURPOSES.

The hire of a building to be used as an office by the officer assigned to the duty of taking charge of the construction of the State, War, and Navy Department building, &c., is in violation of the act of March 3, 1877, chap. 106, which prohibits the renting of any building, or any part of any building, for Government purposes in the District of Columbia, "until an appropriation therefor shall have been made in terms by Congress." 274.

REQUISITION, ISSUE OF.

1. It is the duty of the head of a Department, after facts have been submitted under section 191 Rev. Stat. which, in his judgment, affect the correctness of a balance certified to him upon settlement of a claim by the proper accounting officers of the Treasury, and after the certificate has been returned by the Comptroller with the decision in the case reaffirmed, to issue his requisition for payment of the balance certified. 596.
2. Signing the requisition in such case under protest is without effect.
Ibid.

See ACCOUNTS AND ACCOUNTING-OFFICERS, 7; CLAIMS, 23.

RES ADJUDICATA.

Where an application was made to the Secretary of the Interior to review a decision of his predecessor, but it did not appear that any new facts in the case were presented, nor that any change in the law had taken place since the decision was made: *Held* that the principle of *res adjudicata* applies, and *advised* that the former decision be adhered to. 315.

See CONTRACT, 19.

RESIGNATION.

1. In February, 1876, S., being then minister to England, tendered his resignation, to take effect on the arrival of his successor. A few days thereafter he asked for leave of absence to return to the United States, which was granted. Subsequently the Secretary of State addressed a letter to him at London, informing him of the acceptance of his resignation; but before this letter reached London he had left there for the United States. A nomination having been sent to the Senate in place of S., "resigned": *Held* that S. (being now in the United States) will cease to be minister on the confirmation and appointment of his successor. 90.
2. The opinions of Attorney-General Cushing and Attorney-General Bates (see 6 Opin., 456, and 10 Opin., 229) to the effect that, on general principles of law, the resignation of an officer while insane is to be deemed void, and that, although it may have been accepted without knowledge of the insanity, the acceptance can be recalled and the officer reinstated without a new appointment, reaffirmed; subject, however, to the following qualification, viz., that the Executive Department, after having accepted the resignation, has done no act which prevents the restoration of the *status quo* without impairing or prejudicing the rights of other officers acquired in consequence of such act. 469.
3. Where a resignation of an Army officer has been tendered and accepted without anything more, and a question of insanity afterwards arises, it is competent to the War Department to hear and consider evidence upon the question, and decide and act accordingly. *Ibid.*
4. But where, after acceptance of the resignation and without knowledge of the insanity, the place of the officer has been filled by ap-

RESIGNATION—Continued.

pointment of another thereto, the resignation must be regarded as effective. 470.

RESTORED NAVAL OFFICER.

See **COMPENSATION**, 31, 32.

RETIRED OFFICERS OF THE ARMY.

See **ARMY**, 1, 2, 3, 4, 5, 8, 11, 12, 16, 17, 18; **COMPENSATION**, 11.

RETIRED OFFICERS OF THE MARINE CORPS.

See **MARINE CORPS**.

RETIRED OFFICERS OF THE NAVY.

See **COMPENSATION**, 12, 13, 14, 15; **NAVY**, 5, 6.

REVENUE-MARINE.

Officers in the revenue-cutter service belong to the civil service of the United States, as contradistinguished from the naval and military, and are subject to removal by the President with the concurrence of the Senate. 396.

REVISED STATUTES CONSTRUED, REFERRED TO, ETC.

Page.	Page.		
Section 1	230, 233, 594	Section 363	169
Section 161	343	Section 366	169
Section 169	5, 6	Section 398	462
Section 178	458	Section 403	484
Section 179	458	Section 404	484
Section 180	458	Section 406	485
Section 191	143, 192, 193, 195, 196, 197, 198, 596, 627, 628	Section 459	343
Section 201	6	Section 460	343
Section 213	343	Section 461	343
Section 216	293	Section 490	541
Section 235	6	Section 491	541
Section 256	135, 136	Section 492	541, 544, 548, 549
Section 269	194	Section 515	343
Section 273	41, 141, 194, 196	Section 574	578
Section 277	41, 42, 141, 194	Section 753	181
Section 300 B	36	Section 802	343
Section 313	194	Section 825	388, 566, 567
Section 317	194	Section 827	277
Section 322	6	Section 828	566, 567
Section 327	6	Section 829	347, 537, 566, 567
Section 351	6, 132	Section 838	523
Section 355	213	Section 850	487
Section 356	138, 461, 575	Section 853	282, 595, 633
Section 357	461	Section 854	282, 283, 633
Section 361	461	Section 856	397
		Section 882	343

REVISED STATUTES CONSTRUED, REFERRED TO, ETC.—Cont'd.	
	Page.
Section 1024	635
Section 1063	26
Section 1094	408
Section 1113	279
Section 1119	161
Section 1191	211
Section 1219	334
Section 1222	306, 307, 405, 552, 553, 554
Section 1223	306, 307, 408, 409, 410
Section 1224	405, 406
Section 1252	444
Section 1254	444
Section 1259	307
Section 1260	307
Section 1274	443, 444
Section 1275	444
Section 1291	273
Section 1292	332, 333
Section 1310	110, 112
Section 1314	110, 111, 112
Section 1331	111
Section 1342	153, 157, 330
Section 1362	635
Section 1375	259
Section 1394	635
Section 1410	561, 565
Section 1412	635
Section 1413	165, 597
Section 1454	445
Section 1476	635
Section 1478	597
Section 1484	337
Section 1486	336, 337, 338
Section 1519	636
Section 1521	635
Section 1525	636
Section 1588	318, 319, 320
Section 1590	319, 320
Section 1593	318, 319, 320, 321, 322, 445
Section 1594	317
Section 1622	444
Section 1623	444
Section 1624	165, 598, 635
Section 1763	307, 308
Section 1764	307, 308, 536
Section 1765	71, 307, 308, 536
Section 1767	406
Section 1768	62, 63, 376, 377, 381, 406
Section 1769	207, 377, 399, 400, 401, 406
Section 1785	609
Section 1795	56
Section 1838	213
Section 1994	116, 600
Section 1999	16
Section 2045	406
Section 2053	405, 406
Section 2058	67
Section 2059	405, 406
Section 2062	405, 406
Section 2089	67
Section 2103	351, 588, 589
Section 2104	590
Section 2172	115, 116
Section 2236	62
Section 2306	315
Section 2390	211
Section 2461	437
Section 2462	438
Section 2463	439
Section 2482	340, 342
Section 2484	341, 342
Section 2503	13
Section 2504	13, 33, 51, 74, 80, 173, 174, 200, 201, 491, 492, 493, 629, 657, 658
Section 2505	113, 125, 201
Section 2513	114, 369, 371
Section 2514	369, 371
Section 2536	449
Section 2608	260, 261, 262
Section 2625	399, 400, 401
Section 2630	399
Section 2634	246, 247, 356
Section 2647	117
Section 2648	654
Section 2659	259
Section 2660	259
Section 2675	654, 655
Section 2697	286

REVISED STATUTES CONSTRUED, REFERRED TO, ETC.—Cont'd.

	Page.		Page.
Section 2705	286	Section 3408	218, 374, 375, 453
Section 2722	286	Section 3426	427, 428, 429, 430
Section 2726	260, 261, 262	Section 3445	191
Section 2728	260, 261, 262	Section 3446	191
Section 2745	286, 357	Section 3456	192
Section 2752	396	Section 3463'	88, 134, 136
Section 2760	396	Section 3477	272
Section 2767	166	Section 3480	451, 452
Section 2793	166	Section 3482	42
Section 2900	335, 656	Section 3483	42, 652, 653
Section 2907	77, 105, 174	Section 3491	562
Section 2908	73, 74, 77, 80, 105, 106, 174	Section 3585	234
Section 2926	8, 11	Section 3586	234
Section 2927	8, 11, 12	Section 3617	387, 654, 655
Section 2928	8	Section 3618	323
Section 2929	335	Section 3620	289, 303
Section 2930	656	Section 3621	289
Section 2931	119, 121	Section 3639	289
Section 2932	119, 121	Section 3672	323
Section 2984	9	Section 3673	196
Section 2989	131, 132	Section 3679	124, 151, 209, 210, 271, 272
Section 2990	9, 12, 129	Section 3682	434, 435, 436
Section 2991	10, 11, 129, 130	Section 3692	441, 442
Section 2992	129, 130	Section 3699	413
Section 2993	129, 130	Section 3702	439, 440, 468, 469
Section 2994	10, 12, 128, 129, 130, 131	Section 3703	469
Section 2995	10, 12	Section 3704	468, 469
Section 2996	10	Section 3705	469
Section 3000	129, 130	Section 3709	227, 256, 257, 419, 484, 544, 545, 547
Section 3001	129, 130	Section 3722	227
Section 3012	121, 127	Section 3732	124, 210, 239, 257
Section 3013	121, 127	Section 3733	151, 241, 257
Section 3019	147	Section 3734	151
Section 3020	147, 148	Section 3737	151, 227
Section 3090	388	Section 3739	151, 281
Section 3140	230, 233	Section 3741	151, 281
Section 3216	387	Section 3742	151
Section 3220	428, 429	Section 3743	151
Section 3228	427, 428, 429, 430	Section 3780	544
Section 3247	231	Section 3823	528
Section 3251	559	Section 3826	282, 595
Section 3258	231	Section 3827	529
Section 3259	231	Section 3880	224, 226
Section 3260	231	Section 3894	203
Section 3334	566, 567	Section 3915	263

REVISED STATUTES CONSTRUED, REFERRED TO, ETC.—Cont'd.

	Page.		Page.
Section 3941	484, 528	Section 4778	247, 252
Section 3942	484	Section 4779	247, 252
Section 3944	651	Section 4780	247, 252
Section 3962	70	Section 4782	269
Section 3998	442	Section 5138	607
Section 3999	397	Section 5140	607
Section 4000	603	Section 5153	360, 361
Section 4001	397	Section 5154	607, 608
Section 4002	169, 603	Section 5157	606
Section 4005	169	Section 5189	606
Section 4017	75, 76, 82, 171	Section 5191	606
Section 4020	171, 172	Section 5267	555
Section 4136	403, 404	Section 5275	504
Section 4219	35	Section 5439	211
Section 4225	35	Section 5455	223
Section 4371	35, 52	Section 5474	70
Section 4381	44, 45	Section 5488	289
Section 4438	61	Section 5489	289
Section 4439	61	Section 5492	289
Section 4639	388	Section 5497	289
Section 4641	578	Section 5505	495
Section 4672	349	Section 5595	528, 529
Section 4684	283, 284	Section 5596	261, 331, 341, 450,
Section 4688	283, 284		628
Section 4718	592, 593, 594	Section 5597	320, 341
Section 4723	474	Section 5601	311
Section 4751	436, 437, 438		

REWARD.

See COMPENSATION, 6.

RIPARIAN RIGHTS.

1. The right of the United States, as owner of lot 3, in section 3, township 14 north, range 5 east, at the mouth of Saginaw River, Michigan, to its proportion of the adjoining soil that has appeared above the surface of the river since 1839 is the same, whether such appearance is owing to alluvial deposits or to a recession of the water. 47.
2. Rules suggested for determining the extent and boundaries of that portion of said soil which belongs to the United States as owner of said lot. *Ibid.*
3. Proprietorship of the adjacent lots is not necessary, nor is any permission from riparian proprietors required, to give the United States a right to erect range lights in the waters of Saginaw River; this is a matter between the United States and the State, and not one that concerns the shore owners. *Ibid.*

SANBORN, JOHN D., CLAIM OF.

See CLAIMS, 10, 11; COMPENSATION, 6, 7.

SAGINAW RIVER, LANDS AT MOUTH OF.

See RIPARIAN RIGHTS, 1, 2.

SAVINGS BANKS, TAXATION ON DEPOSITS IN.

See INTERNAL REVENUE, 12.

"SAWED TIMBER" AND "SAWED LUMBER."

See CUSTOMS LAWS, 26.

SCHOOL LANDS IN CALIFORNIA.

See LANDS, PUBLIC, 5, 6.

SECRETARY OF THE INTERIOR.

See LANDS, PUBLIC, 4; UNEXPENDED BALANCES OF APPROPRIATIONS, 1.

SECRETARY OF THE NAVY.

1. By section 4751 Rev. Stat., the Secretary of the Navy has power to mitigate any fine, penalty, or forfeiture incurred under the provisions of the sections designated therein; and this power may be exercised by him as well where the proceedings, civil or criminal, have not been instituted with his knowledge and by his direction as where they have been thus instituted. 436.
2. The Secretary of the Navy has not power, under the circumstances stated, to release a contractor from his undertaking to furnish (among other enumerated articles) "a saw, futtock, for boat-builders' use, Knowlton's patent," to the several navy-yards. 481.

See NAVAL ACADEMY, 3; NAVY, 9, 10.

SECRETARY OF THE TREASURY.

1. Powers of the Secretary, under sections 3012½ and 3013 Rev. Stat., with reference to refunding for overpayment of duties, explained. 119.
2. Section 1 of the act of March 3, 1875, chap. 136, instead of conferring new powers upon the Secretary of the Treasury, restricts those already possessed under sections 3012½ and 3013 Rev. Stat. But cases in which the Secretary has made no ruling or decision are not within its operation. 126.
3. Importers, before being concluded, are entitled to a ruling of the Secretary, if they have taken the proper steps to obtain it; which ruling, after it is made, can only be declared erroneous in law, as to duties actually paid under it, by the judgment of a court. *Ibid.*
4. Section 2 of said act authorizes the Secretary, with the concurrence of the Attorney-General, to modify adversely to the United States any construction of the tariff previously adopted; but no refund can be made by him of duties which have been collected under

SECRETARY OF THE TREASURY—Continued.

such construction, except in pursuance of a judicial decision.
Ibid.

5. Under section 2969, Rev. Stat., the Secretary of the Treasury can make no regulations other than those which may be deemed expedient and necessary for the due execution of such parts of the revenue laws as relate to warehouses. 128.
6. But the provisions of section 251 Rev. Stat. comprehend the making of rules and regulations for the transportation of appraised merchandise in bond from one collection district to another, and they invest the Secretary with authority over that subject as ample as that which he formerly derived under the fifth section of the act of August 6, 1846, chap. 84, and the ninth section of the act of March 28, 1854, chap. 30. *Ibid.*
7. The Secretary of the Treasury cannot, under section 2634 Rev. Stat., give to officers whose compensation is fixed by law a compensation which shall be regulated by his own discretion. 286.
8. Upon examination of section 3618 Rev. Stat., amended by act of February 27, 1877, chap. 69, and also of section 3672 Rev. Stat.: *Advised* that the Chief of the Bureau of Engraving and Printing cannot be authorized by the Secretary of the Treasury to exchange certain old presses for a new press with the manufacturers, so that but a small amount of money in addition will have to be paid to them therefor; yet that the Secretary may authorize a sale of the old presses to the manufacturers, the proceeds to be covered into the Treasury, and at the same time a purchase of the new press can be made from them, paying for the same out of the appropriation available for that purpose. 322.
9. The Secretary of the Treasury has authority to deposit the moneys received by the sale of bonds under the acts of July 14, 1870, chap. 256, and January 14, 1875, chap. 15, with public depositaries designated and selected by him under the provisions of sections 5153 Rev. Stat., taking such security as the statute requires. 359.
10. The Secretary of the Treasury has authority, under section 3699 Rev. Stat., to fix a currency price for disposing of gold within a limited period, subject to his power at any time to terminate the period for which the limit was made, or to change such price so as to conform to the market rate. 413.
11. His authority to dispose of the gold is subject to no limitation as to amount, except that which is imposed by the same section. *Ibid.*
 See APPEALS IN CUSTOMS CASES, 1, 2, 3; BONDS OF THE UNITED STATES, 1; CLAIMS, 17, 18; COMPENSATION, 9; DIRECT-TAX LAW; DISBURSING OFFICERS, 1, 2, 5; INTERNAL REVENUE, 2; UNEXPENDED BALANCES OF APPROPRIATIONS, 4.

SECRETARY OF WAR.

See ARMY, 15, 24; CONTRACT, 6, 11; COURT-MARTIAL, 1, 3, 5; NAVIGATION, 2; PAY-ACCOUNTS OF ARMY OFFICERS, 1; POST-TRADER; RESIGNATION, 3.

SENTENCE OF COURT-MARTIAL, APPROVAL OF.

See COURT-MARTIAL, 1, 2, 3, 4, 5.

SETTLEMENT WITH CERTAIN SOUTHERN R. R COMPANIES.

See ACCOUNTS AND ACCOUNTING-OFFICERS, 1.

SOUTH PASS OF THE MISSISSIPPI, IMPROVEMENT OF.

1. The conditions imposed by the second *proriso* in section 4 of the act of March 3, 1875, chap. 134, viz: "unless the said Eads and his associates shall secure a navigable depth of 20 feet of water *through said pass* within thirty months," &c., and "unless the said Eads and his associates shall secure an additional depth of not less than two feet during each succeeding year thereafter until 26 feet shall have been secured," &c., operate to bind Eads and his associates, on pain of forfeiture of their privileges, &c., to secure a navigable depth of 20, 22, 24, and 26 feet, within the periods designated, through the channel over the shoal at the head of the pass and likewise over the bar at its mouth; and, by necessary implication, also to secure a navigable width of the required depth. 183.
2. The provisions in other parts of said act requiring specific depths and widths, varying from 20 feet in depth by 200 feet in width to 30 feet in depth by 350 feet in width, relate solely to the work at the mouth of the pass. *Ibid.*
3. So soon as the depth and width required by those provisions for payment of any installment are obtained, the payment of such installment may then be made, if no forfeiture has been incurred under the conditions contained in said *proriso*. *Ibid.*

SPECIAL AGENTS OF POST-OFFICE DEPARTMENT.

See COMPENSATION, 2, 3, 4, 23; POSTAL LAWS, 6.

STATUTES, INTERPRETATION OF.

1. The act of February 27, 1877, entitled "An act to perfect the revision of the statutes of the United States," &c., must be deemed to take effect only from its date; there being nothing in its language which expressly, or by necessary implication, gives to it a retrospective operation. 222.
2. The principle is well settled that statutes are to be construed as operating prospectively only, unless their language clearly and imperatively demands that retrospective effect should be given to them. *Ibid.*
3. The amendments of sections 2659 and 2660 Rev. Stat., made by the act of February 27, 1877, chap. 69, are not retroactive. That act takes effect, not from the date of the Revised Statutes which it amends, but from the date of its own enactment, except in a case where (as in the amendment of section 1375) the purpose to make it retrospective is distinctly indicated. (Opinion of April 7, 1877, referred to and reaffirmed.) 259.
4. *Semblo* that the original dates of the provisions of the Revised Statutes must be considered in determining their effect upon each

STATUTES, INTERPRETATION OF—Continued.

other, and that a previous decision of a court or a Department based upon the circumstance that one such provision is an earlier, and the other a later, expression of the will of Congress, binds as much as ever. 493.

5. The provisions of the act of March 3, 1877, chap. 119, by which the Secretary of War is "authorized to reopen the settlement made by the United States Government with the Western and Atlantic Railroad of the State of Georgia," &c., are mandatory. The word "authorized," as there used, confers a power, the exercise of which is not meant to be dependent upon the discretion of the Secretary, but to be imperative upon him when he is applied to by the party interested. 621.
6. The proceedings in Congress on the bill concerning the settlement made with the Western and Atlantic Railroad of Georgia are not admissible to control the words finally adopted by that body to convey its meaning in the act relating to the same matter (act of March 3, 1877, chap. 119). 625.
7. Statutes imposing disabilities are not to be extended by construction. 652.

See ACCOUNTS AND ACCOUNTING-OFFICERS, 3, 5, 9, 10, 11, 12; ADVERTISEMENTS, 2, 3, 4, 5, 6; APPOINTMENT, 1, 2, 5, 6, 10; APPROPRIATIONS, 1, 3, 4, 5; ARMY, 1, 6, 7, 8, 10, 16, 17, 18, 23; BONDS OF THE UNITED STATES, 1, 2, 3; BOUNTY; BOUNTY LAND CLAIMS; CITIZENSHIP, 2, 5; CLAIMS, 4; COLLECTOR OF CUSTOMS; COMPENSATION, 4, 12, 13, 15, 16, 18, 19, 20, 23, 24, 25, 29, 30, 33; CONTRACT, 2, 7, 8, 9, 12, 14, 15, 16, 18, 30; CURRENCY; CUSTOMS LAWS, 2, 5, 6, 8, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 29, 30; DISBURSING OFFICERS, 1, 2, 3; DISTRICT ATTORNEY, 1; DISTRICT OF COLUMBIA, 2, 3, 4; ENROLLMENT AND LICENSE OF VESSELS, 1, 2; INTERNAL REVENUE, 2, 4, 6, 8, 9, 10, 12, 13, 14; LANDS, PUBLIC, 3, 5, 6; NAVY, 1, 3; OFFICIAL ENVELOPE, 1, 2, 3, 5; PAY ACCOUNTS OF ARMY OFFICERS; PENSION, 1; POSTAL LAWS, 3, 5, 7, 8, 9, 10; PRIZE, DISTRIBUTION OF, 1; PURCHASE OF LAND; REGISTRY OF VESSELS; SECRETARY OF THE NAVY, 1; SECRETARY OF THE TREASURY, 1, 2, 4, 5, 6, 7, 8, 9, 10; SOUTH PASS OF THE MISSISSIPPI, IMPROVEMENT OF, 1, 2; SUBSIDIARY SILVER COIN, ISSUE OF, 1; SUSPENSION OF OFFICERS, 5; TONNAGE DUES; TRAVELING ALLOWANCES, 1, 2, 4; WASHINGTON MONUMENT; WITNESS.

STEINKAULER'S CASE.

See CITIZENSHIP, 1.

STORAGE FEES.

See COMPENSATION, 5.

SUBSIDIARY SILVER COIN, ISSUE OF.

1. Under the third section of the joint resolution of July 22, 1876, the amount of "fractional currency outstanding" is to be determined

SUBSIDIARY SILVER COIN, ISSUE OF—Continued.

not merely by the records of the Treasury Department which show how much has been issued and redeemed, but also by ascertaining how much has been lost or destroyed so that it can never be presented for redemption. 312.

2. When satisfied as to the amount lost or destroyed, the Secretary of the Treasury has authority to issue an equal amount of subsidiary silver coin to replace it, subject to this restriction, viz., that the aggregate amount of subsidiary silver coin put in circulation, together with the amount of fractional currency outstanding, is not at any time to exceed \$50,000,000. *Ibid.*

SUPERINTENDENT OF THE MILITARY ACADEMY.

See **MILITARY ACADEMY.**

SUPPORT OF THE ARMY.

See **ARMY**, 9, 10.

SURETY.

See **OFFICIAL BOND.**

SURVEYOR OF CUSTOMS.

The duties of the office of surveyor of customs, whilst it is in "abeyance," are, by section 1769 Rev. Stat., construed in connection with section 2625 Rev. Stat., devolved upon such customs officer as the collector of the district may authorize to perform them. 401.

SUSPENSION OF OFFICERS.

1. An order of the President suspending an officer, under section 1768 Rev. Stat., takes effect upon due notice thereof to the officer, unless by the terms of the order it is to take effect at a stated time after notice. Receipt of the order by the officer is due notice. 62.
2. Where an officer is suspended, but continues afterwards to perform the duties of the office (there being no one at the time authorized to enter upon the performance of such duties), his acts are those of an officer *de facto*, and are valid so far as they concern the interests of the public. *Ibid.*
3. Where no nomination in place of a suspended officer has been sent in, and the Senate adjourns, or, a nomination having been sent in, the Senate adjourns without confirming it, the officer suspended thereupon becomes reinstated, but he may be again suspended by the President, as before. 376.
4. Where an officer has been suspended during a recess of the Senate and another person designated to perform his duties, under section 1768 Rev. Stat., the President may at any time revoke the suspension and thus reinstate the officer. 380.
5. Under section 2045 Rev. Stat., an Indian agent may, *at any time*, be suspended, and the place temporarily filled in the mode there provided. 405.

SWAMP LANDS, INDEMNITY TO STATES FOR.

See **LANDS, PUBLIC**, 2, 3.

TAXES.

A wagon, employed by its owner in transporting the mail from point to point within the city of Baltimore, is not exempt from local taxation by reason of its employment in the mail service. 338.

TAX-LIEN.

See **TRANSFER OF JURISDICTION**, 1.

TELEGRAPH.

1. A company chartered by the State of Oregon, subsequently to the act of July 24, 1866, chap. 230, constructed a telegraph line over public domain of the United States within that State, but never filed a "written acceptance," as required by that act, and declines to comply with the provisions of that act as to rates for Government telegrams: *Advised* that the company, in respect of the erection of its telegraph on the public lands, is a trespasser, and that the United States (without special legislation) are entitled to all ordinary remedies for trespass given at law, as well as to all extraordinary remedies given in equity. 554.
2. In transmitting Government dispatches from Leavenworth, Kans., to points in Colorado, the Western Union Telegraph Company has not the option to send them either by way of Denver (over the telegraph line constructed along the Kansas Pacific Railroad) or by way of Pueblo (over the telegraph line constructed along the Atchison, Topeka, and Santa Fé Railroad). 579.
3. The option of selecting the route is with the Government; and where no option is expressed thereby, the company is bound to send the dispatch over the cheaper route. *Ibid.*
4. The acceptance by the said company of the rates established by the Postmaster-General under the act of July 24, 1866, chap. 230, was not a waiver of the right of the company to change its local tariff rates over the telegraph line constructed along the Kansas Pacific Railroad between Lawrence and Denver. *Ibid.*

TEMPORARY APPOINTMENT BY THE PRESIDENT.

See **APPOINTMENT**, 4.

TENURE OF OFFICE.

See **PRESIDENT**, 6, 7, 8, 9, 10; **SUSPENSION OF OFFICERS**, 1, 5.

TIMBER, DUTY ON.

See **CUSTOMS LAWS**, 5, 6.

TONNAGE DUES.

Under sections 4219, 4225, and 4371, Rev. Stat., certain foreign vessels, when found trading between district and district, &c., are liable to tonnage dues (including light-money), amounting to one dollar and thirty cents per ton. 35.

TRADERS AT MILITARY POSTS.

See **POST-TRADER.**

TRANSFER OF JURISDICTION.

1. The United States, in 1872, acquired title to a lot of ground in Saint Louis, Mo., by condemnation under a State statute, by the provisions whereof the jurisdiction of the State over the premises at the same time passed to the United States. Thereafter certain bills for unpaid taxes assessed for the years 1873, 1872, and previous years, were presented to the Treasury Department for payment, a lien on the premises for those taxes being claimed: *Held* that the State, in parting with its jurisdiction, relinquished its lien on the land for taxes, and that they are not a proper charge against the United States. 167.
2. Consent of the legislature of Texas to the purchase by the United States of the building site recently acquired in the city of Austin was given by operation of a law of that State passed April 4, 1871. *Held* that such consent worked a transfer of jurisdiction over the site from the State to the United States when the title to the site became vested in the latter.

TRANSPORTATION OF MERCHANDISE IN BOND.

See **CUSTOMS LAWS**, 17; **SECRETARY OF THE TREASURY**, 6.

TRANSPORTATION OF THE MAIL.

See **POSTAL LAWS**, 1, 2, 3, 4, 7, 11, 12, 13, 14, 15; **CONTRACT**, 33, 34, 35.

TRAVELING ALLOWANCES.

1. Under the act of February 22, 1875, chap. 95, only *one* charge for mileage is allowable for the service of several writs in hand at the same time, requiring the marshal to travel to the same place or in the same direction. (*Contra*, see **NOTE**, p. 109.) 108.
2. Under the act of June 30, 1876, chap. 159, mileage is allowable to officers of the Navy only when traveling on public business within the United States. For travel without the United States their actual expenses alone can be allowed. 309.
3. *Held*, accordingly, that where a naval officer was ordered home from Hong-Kong, and furnished with a through ticket (such ticket being assumed to have covered his actual expenses), he is not entitled to the difference between the cost of that ticket and the mileage established by that act. *Ibid.*
4. Under section 24, act of July 15, 1870, chap. 294, Army officers traveling abroad upon public business (their transportation not being furnished by the Quartermaster's Department, or on a conveyance belonging to or chartered by the United States) were entitled to mileage at the rate of 10 cents per mile for sea travel as well as for land travel. 496.
5. The rule which forbids mileage for sea travel to naval officers under the second section of the act of March 3, 1835, chap. 27, does not apply to or govern questions of mileage to Army officers under the act of 1870. *Ibid.*

TREASURY DEPARTMENT.

See APPOINTMENT, 1, 2.

TREATIES WITH FOREIGN GOVERNMENTS.

1. The term "fishery," in the legal parlance of the United States and Great Britain, primarily denotes one of that class of objects of property known as *things incorporeal*; and such is its signification as used in article 21 of the treaty of May 8, 1871, between those countries. 661.
2. Accordingly the phrase in that article, "produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward Island," covers only the produce of incorporeal things so denominated belonging to those governments respectively. *Ibid.*
3. Canada and Prince Edward Island derive no right under the treaty to import into the United States free of duty fish, &c., caught by their subjects no matter where, nor do the United States derive thereunder a corresponding right against Canada and Prince Edward Island. *Ibid.*

See CITIZENSHIP, 1; EXTRADITION; JURISDICTION.

TRESPASS ON PUBLIC LANDS.

See TELEGRAPH.

TWENTY PER CENT. ADDITIONAL DUTY.

See CUSTOMS LAWS, 23.

UNEXPENDED BALANCES OF APPROPRIATIONS.

1. The Secretary of the Interior is authorized to apply certain unexpended balances of appropriations to defray certain charges incurred by his Department in connection with the Centennial Exhibition. 204.
2. Under section 5 of the act of June 20, 1874, chap. 328, it is the duty of disbursing officers, with whom funds have been placed for disbursement, when the time arrives at which unexpended balances of the appropriations from which such funds were drawn lapse, to repay the funds remaining in their hands, in order that they may be carried to the surplus fund and covered into the Treasury. 357.
3. Where, previous to that time, these officers have issued certificates by which claims upon such appropriations have been definitely ascertained, and payment thereof has not actually been made before that time, such claims may thereafter be paid by them out of the proper funds remaining in their hands. *Ibid.*
4. For what period and to what amount such officers should be allowed to retain in their hands funds for that purpose, after the date when unexpended balances of the appropriation lapse, is a matter of administration, falling within the province of the Secretary of the Treasury to regulate. 358.

UNION PACIFIC RAILROAD COMPANY.

See PACIFIC RAILROADS.

VACANT OFFICE, TEMPORARY FILLING OF.

The ten days' limitation imposed by section 150 Rev. Stat. upon the temporary filling of vacancies occasioned by death or resignation is to be computed from the date of the President's action. 457.

WASHINGTON MONUMENT.

1. Provisions of the act of August 2, 1876, chap. 250, entitled "An act providing for the completion of the Washington Monument," examined and explained. 149.
2. The act contemplates that the joint commission, by the use of the sum appropriated and such money and materials as may be collected by the Washington National Monument Society, shall continue the construction of the monument and carry it forward towards completion, not that it shall be completed within the sum appropriated; and, furthermore, that the plan adopted and partly executed by the society shall be followed by the commission. *Ibid.*
3. The entire direction and supervision of the work are intrusted to the joint commission. *Ibid.*

WESTERN AND ATLANTIC RAILROAD OF GEORGIA.

See **STATUTES, CONSTRUCTION OF**, 5, 6.

WIDOW PENSIONER.

See **PENSION**.

WITHDRAWAL OF BID.

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WITNESS.

1. Expenses necessarily incurred by an officer of the Army as a witness for the Government in judicial proceedings before the civil authorities are allowable under section 850 Rev. Stat., and payable from the judiciary fund. 486.
2. The prohibition in that section against the allowance of mileage applies as well to military as to civil officers who may be sent away on such service. *Ibid.*

WRECK, REMOVAL OF.

See **NAVIGATION**, 1.











SWAMP LANDS, INDEMNITY TO STATES FOR.

See **LANDS, PUBLIC**, 2, 3.

TAXES.

A wagon, employed by its owner in transporting the mail from point to point within the city of Baltimore, is not exempt from local taxation by reason of its employment in the mail service. 338.

TAX-LIEN.

See **TRANSFER OF JURISDICTION**, 1.

TELEGRAPH.

1. A company chartered by the State of Oregon, subsequently to the act of July 24, 1866, chap. 230, constructed a telegraph line over public domain of the United States within that State, but never filed a "written acceptance," as required by that act, and declines to comply with the provisions of that act as to rates for Government telegrams: *Advised* that the company, in respect of the erection of its telegraph on the public lands, is a trespasser, and that the United States (without special legislation) are entitled to all ordinary remedies for trespass given at law, as well as to all extraordinary remedies given in equity. 554.
2. In transmitting Government dispatches from Leavenworth, Kans., to points in Colorado, the Western Union Telegraph Company has not the option to send them either by way of Denver (over the telegraph line constructed along the Kansas Pacific Railroad) or by way of Pueblo (over the telegraph line constructed along the Atchison, Topeka, and Santa Fe Railroad). 579.
3. The option of selecting the route is with the Government; and where no option is expressed thereby, the company is bound to send the dispatch over the cheaper route. *Ibid.*
4. The acceptance by the said company of the rates established by the Postmaster-General under the act of July 24, 1866, chap. 230, was not a waiver of the right of the company to change its local tariff rates over the telegraph line constructed along the Kansas Pacific Railroad between Lawrence and Denver. *Ibid.*

TEMPORARY APPOINTMENT BY THE PRESIDENT.

See **APPOINTMENT**, 4.

TENURE OF OFFICE.

See **PRESIDENT**, 6, 7, 8, 9, 10; **SUSPENSION OF OFFICERS**, 1, 5.

TIMBER, DUTY ON.

See **CUSTOMS LAWS**, 5, 6.

TONNAGE DUES.

Under sections 4219, 4225, and 4371, Rev. Stat., certain foreign vessels, when found trading between district and district, &c., are liable to tonnage dues (including light-money), amounting to one dollar and thirty cents per ton. 35.

TRADERS AT MILITARY POSTS.

See **POST-TRADER.**

TRANSFER OF JURISDICTION.

1. The United States, in 1872, acquired title to a lot of ground in Saint Louis, Mo., by condemnation under a State statute, by the provisions whereof the jurisdiction of the State over the premises at the same time passed to the United States. Thereafter certain bills for unpaid taxes assessed for the years 1873, 1872, and previous years, were presented to the Treasury Department for payment, a lien on the premises for those taxes being claimed: *Held* that the State, in parting with its jurisdiction, relinquished its lien on the land for taxes, and that they are not a proper charge against the United States. 167.
2. Consent of the legislature of Texas to the purchase by the United States of the building site recently acquired in the city of Austin was given by operation of a law of that State passed April 4, 1871. *Held* that such consent worked a transfer of jurisdiction over the site from the State to the United States when the title to the site became vested in the latter.

TRANSPORTATION OF MERCHANDISE IN BOND.

See **CUSTOMS LAWS**, 17; **SECRETARY OF THE TREASURY**, 6.

TRANSPORTATION OF THE MAIL.

See **POSTAL LAWS**, 1, 2, 3, 4, 7, 11, 12, 13, 14, 15; **CONTRACT**, 33, 34, 35.

TRAVELING ALLOWANCES.

1. Under the act of February 22, 1875, chap. 95, only *one* charge for mileage is allowable for the service of several writs in hand at the same time, requiring the marshal to travel to the same place or in the same direction. (*Contra*, see **NOTE**, p. 109.) 108.
2. Under the act of June 30, 1876, chap. 159, mileage is allowable to officers of the Navy only when traveling on public business within the United States. For travel without the United States their actual expenses alone can be allowed. 309.
3. *Held*, accordingly, that where a naval officer was ordered home from Hong-Kong, and furnished with a through ticket (such ticket being assumed to have covered his actual expenses), he is not entitled to the difference between the cost of that ticket and the mileage established by that act. *Ibid.*
4. Under section 24, act of July 15, 1870, chap. 294, Army officers traveling abroad upon public business (their transportation not being furnished by the Quartermaster's Department, or on a conveyance belonging to or chartered by the United States) were entitled to mileage at the rate of 10 cents per mile for sea travel as well as for land travel. 496.
5. The rule which forbids mileage for sea travel to naval officers under the second section of the act of March 3, 1835, chap. 27, does not apply to or govern questions of mileage to Army officers under the act of 1870. *Ibid.*

TREASURY DEPARTMENT.

See APPOINTMENT, 1, 2.

TREATIES WITH FOREIGN GOVERNMENTS.

1. The term "fishery," in the legal parlance of the United States and Great Britain, primarily denotes one of that class of objects of property known as *things incorporeal*; and such is its signification as used in article 21 of the treaty of May 8, 1871, between those countries. 661.
2. Accordingly the phrase in that article, "produce of the fisheries of the United States, or of the Dominion of Canada, or of Prince Edward Island," covers only the produce of incorporeal things so denominated belonging to those governments respectively. *Ibid.*
3. Canada and Prince Edward Island derive no right under the treaty to import into the United States free of duty fish, &c., caught by their subjects no matter where, nor do the United States derive thereunder a corresponding right against Canada and Prince Edward Island. *Ibid.*

See CITIZENSHIP, 1; EXTRADITION; JURISDICTION.

TRESPASS ON PUBLIC LANDS.

See TELEGRAPH.

TWENTY PER CENT. ADDITIONAL DUTY.

See CUSTOMS LAWS, 23.

UNEXPENDED BALANCES OF APPROPRIATIONS.

1. The Secretary of the Interior is authorized to apply certain unexpended balances of appropriations to defray certain charges incurred by his Department in connection with the Centennial Exhibition. 204.
2. Under section 5 of the act of June 20, 1874, chap. 328, it is the duty of disbursing officers, with whom funds have been placed for disbursement, when the time arrives at which unexpended balances of the appropriations from which such funds were drawn lapse, to repay the funds remaining in their hands, in order that they may be carried to the surplus fund and covered into the Treasury. 357.
3. Where, previous to that time, these officers have issued certificates by which claims upon such appropriations have been definitely ascertained, and payment thereof has not actually been made before that time, such claims may thereafter be paid by them out of the proper funds remaining in their hands. *Ibid.*
4. For what period and to what amount such officers should be allowed to retain in their hands funds for that purpose, after the date when unexpended balances of the appropriation lapse, is a matter of administration, falling within the province of the Secretary of the Treasury to regulate. 358.

UNION PACIFIC RAILROAD COMPANY.

See PACIFIC RAILROADS.

VACANT OFFICE, TEMPORARY FILLING OF.

The ten days' limitation imposed by section 130 Rev. Stat. upon the temporary filling of vacancies occasioned by death or resignation is to be computed from the date of the President's action. 457.

WASHINGTON MONUMENT.

1. Provisions of the act of August 2, 1876, chap. 250, entitled "An act providing for the completion of the Washington Monument," examined and explained. 149.
2. The act contemplates that the joint commission, by the use of the sum appropriated and such money and materials as may be collected by the Washington National Monument Society, shall continue the construction of the monument and carry it forward towards completion, not that it shall be completed within the sum appropriated; and, furthermore, that the plan adopted and partly executed by the society shall be followed by the commission. *Ibid.*
3. The entire direction and supervision of the work are intrusted to the joint commission. *Ibid.*

WESTERN AND ATLANTIC RAILROAD OF GEORGIA.

See STATUTES, CONSTRUCTION OF, 5, 6.

WIDOW PENSIONER.

See PENSION.

WITHDRAWAL OF BID.

See CONTRACT, 37.

WITNESS.

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WRECK, REMOVAL OF.

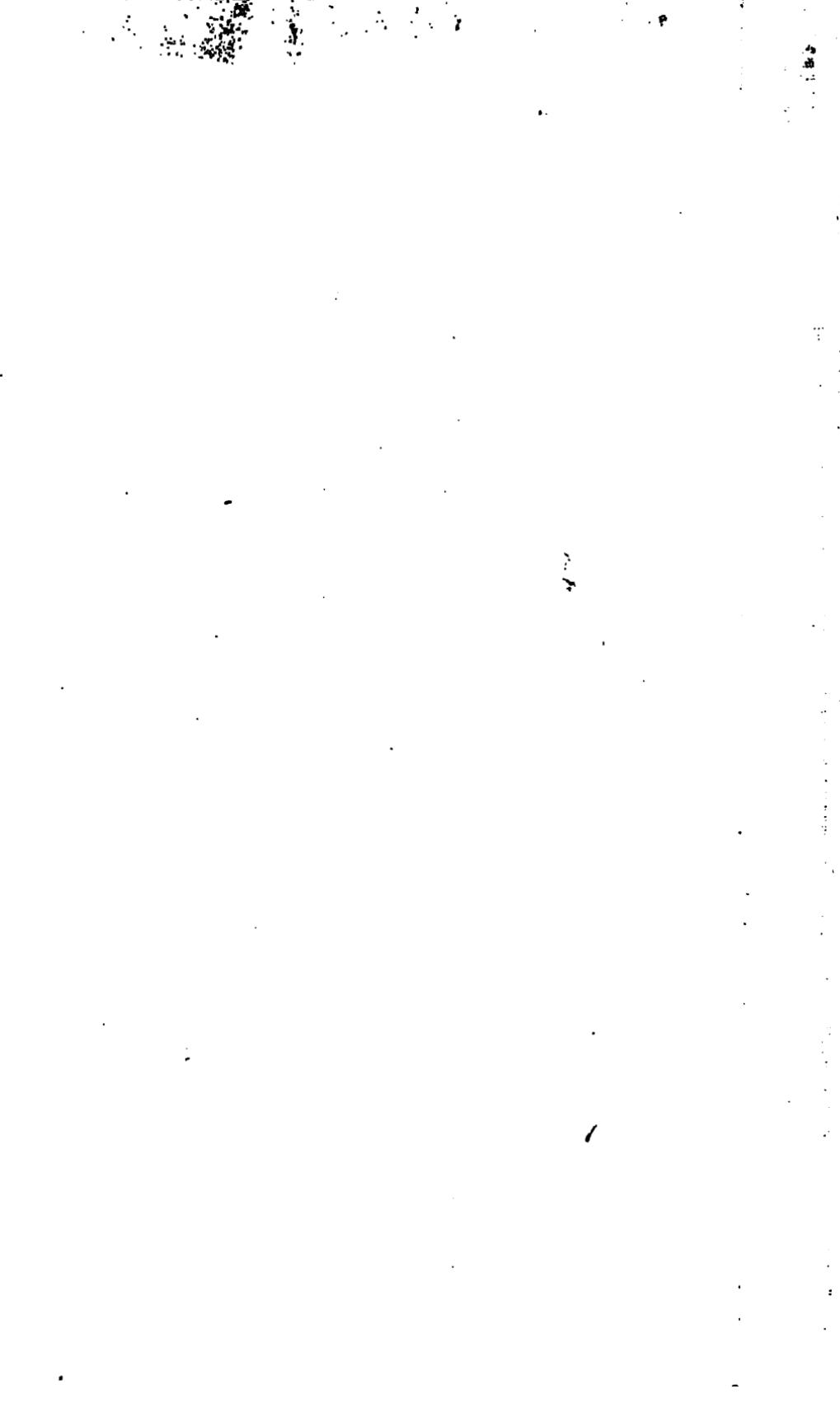
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